Strong

1879

Motion to dismiss

12-180

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 843.

THE DAVENPORT AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

RENWICK, SHAW & CROSSETT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 23, 1879.

SUPREME COURT OF THE UNITED STATES

No. 843.

THE DAVENPORT AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

RENWICK, SHAW & CROSSETT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

PLEADINGS.

	Original.	Print.
Petition of Davenport and Northwestern Railway Company to sheriff to appoint appraisers	3	1
Appointment of appraisers by sheriff, with notice of time and place when and where to meet	5	2
Notice to Renwick, Shaw & Crossett of appointment of appraisers and time and place of meeting	6	3
Oath administered to appraisers	7	4
Report of appraisers	8	4
Notice of Railway Company to Renwick, Shaw & Crossett to vacate premises	10	5
Notice of appeal from assessment by appraisers to Renwick, Shaw & Crossett and sheriff	12	6
Amendment to condemnation proceedings by railway company	13	7
Same	14	8
Same	15	8
Motion to file one of said amendments	16	9

TESTIMONY OF APPELLEES.

Thomas Murray	16	9
Edward Durant	22	12
A. F. Jenks	34	18
De Forrest Dorrance	39	20
J. G. Suiter	46	24
J. W. Rambo	50	26
William Renwick	55	28
D. A. McDonald	76	39
J. S. Keator	79	40

	Original.	Print.
J. B. Phelps	81	41
L. S. Davies	84	43
John M. Gould	86	44
George H. French	89	45

TESTIMONY OF APPELLANT.

W. M. Suiter	92	47
J. G. Goldsmith	93	48
Stephen Rhodes	94	48
John Suiter	94	48
D. H. Ainsworth	95 and 103	48, 53
John E. Henry	100	51
Henry Lambach	103	52
E. F. Hoffman	105	53
A. C. Fulton	107	55
John Lambert	111	57
John R. Boyle	112	57
Horace Bradley	114	58
Jacob Eldridge	114	58
Charles Eldridge	116	59
W. P. Campbell	119	60
J. Goldsbury	117	60
E. S. Crossett	121	61
M. O. Barnes	121	62
Motion for new trial	122	62
Deposit of amount of verdict with sheriff	124	63
Exception to charge of court	124	63
Judgment entry	124½	63
Instructions to jury	125	64
Bill of exceptions	125	64
Instructions asked by appellees	144	74
Instructions asked by appellant	147	75
Exhibits A, B, L, M, O, P, R, S, and T (attached to transcript)	157	81
Exhibit C	157	81
C1	159	82
D	160	82
E	160	82
F	160	82
G	161	83
H	161	83
I	161	83
J	162	83
K	162	83
N	162	83
Q	169	88

PROCEEDINGS IN SUPREME COURT.

Submission	170	89
Judgment	171	89
Petition for writ of error	172	89
Bond	174	90
Writ of error	178	91
Citation	179	91
Clerk's certificate	181	92

1 Supreme court of Iowa.

Hon. James H. Rothrock, chief justice.
Hon. James M. Beck, Hon. Austin Adams, Hon. W. H. Seevers, Hon. James G. Day, justices.
E. J. Holmes, clerk.

2 Supreme court of Iowa.

RENWICK, SHAW AND CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILway Co., appellant.

Be it remembered that heretofore, to wit, on the 11th day of September, A. D. 1878, there was filed in the office of the clerk of the supreme court of Iowa the following record in the above-entitled cause, upon which the said cause was heard in said supreme court, in words and figures following, to wit:

2½ In the supreme court of Iowa, October term, 1878.

RENWICK, SHAW & CROSSETT, APPELLEES,
vs.
THE DAVENPORT AND NORTHWESTERN RAILway Co., appellant. } No. 2591. At law.

Appeal from the judgment of the Scott County, Iowa, circuit court.

APPELLANT'S ABSTRACT OF RECORD.

Grant & Grant and Bills & Block, for appellant.
Davison & Lane and Putnam & Rogers, for appellees.

3 *Abstract of record.*

On September 7th, 1876, the Davenport & Northwestern Railway Company filed with the sheriff of Scott County its petition for the appointment of six disinterested freeholders as appraisers to inspect and condemn its right of way across (among others) the leasehold interest of appellees in the property described in said petition, which petition, leaving out the descriptions of property other than that leased by said appellees, is in words and figures following, to wit:

STATE OF IOWA,
Scott County, ss:

In the Scott County circuit court, and to the sheriff of Scott County:

The petition of the Davenport & Northwestern Railway Company shows that it is a corporation organized under the laws of the State of Iowa to build a railroad, and is engaged in building a railroad, from Davenport, in Scott County, to or near Fayette, in Fayette County, and thence to a point at or near Cresco, in Howard County, Iowa.

That in building said railroad it is necessary, for the convenient construction of said road, to appropriate and use the following, among

other tracts of land, to wit: (Leaving out all except appellees') a strip of land not exceeding 100 feet in width on the Mississippi River, between high and low water mark, in the city of Davenport, in front of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, in block 1 of Churchill's addition to Davenport, and in front of the following tract of land in said city, adjoining the said lots, beginning in Le Claire's reservation, on the Mississippi River bank, at the southwest corner 4 of Churchill's addition, thence north 396 feet, thence west 330 feet at the river bank, thence south 660 feet, and thence east, following the meanders of the river, to the place of beginning. The land above high water is owned by Wm. Renwick, and occupied by Renwick, Shaw & Crossett.

The city of Davenport has consented to the use of land between high and low water mark.

(Leaving out other property not in controversy.)

The petitioner will furnish to the commissioners and annex hereto a map of the line of said road from Spring street to Main street in the city of Davenport.

That your petitioner has not been able to agree with Messrs. Renwick, Shaw & Crossett (and others) upon the compensation to be paid them and each of them, respectively, for the appropriation of said tracts of land.

The petitioner denies that Renwick, Shaw & Crossett (and others) have any right whatever to damages for the use of the land above described between high and low water mark on the Mississippi River.

That, denying any right to damages therein, your petitioner intends to build its road where it is located, between high and low water mark, so as to make no material obstruction to the free access and use of said river by the land owners or the public.

Your petitioner desires and requests the sheriff of said county to appoint six disinterested freeholders of said county to inspect said premises, and assess the damages which the said owners will sustain by reason of the appropriation of their respective tracts of land or rights therein, for the use of said railway corporation.

And also to assess and enquire whether any and what damages 5 will be sustained by Renwick, Shaw & Crossett (and others) by reason of the building of said railroad on the land above described, between high and low water mark, above referred to.

(Signed.)

And said sheriff appointed as said six appraisers, or freeholders, John R. Boyle, Horace Bradley, John M. Eldridge, Chauncy Krum, Gus. Schnitger, James Baker; and said Chauncy Krum having failed to appear at the time and place named, John Lambert was appointed in his place and stead, and appointed Thursday, September 14th, 1876, at 10 o'clock a. m., as the time and place for said appraisers to meet and inspect said premises, and assess the damages of appellees, which said appointment and notice are in words and figures following, to wit:

STATE OF IOWA,
Scott County, ss:

To John R. Boyle, Horace Bradley, John M. Eldridge, Chauncy Krum, Gustav Schnitger, James Baker, disinterested freeholders of Scott County:

Know you that I have appointed you commissioners to inspect the real estate and assess the damages thereto by reason of the appropria-

tion of the lands of any of the inhabitants of Scott County, of their real estate, to the use of the Davenport & Northwestern Railway Company, a corporation organized by the laws of this State, and particularly the lands of Renwick, Shaw & Crossett (and others). A copy of the petition of said corporation for the condemnation of said lands, and a description thereof, is furnished to you; and you will meet at such time and place as you may require, five days' notice and the day and hour when you will meet to inspect the premises and assess the damages must be given by said petitioners, which is fixed for Thursday, the 14th day of September, 1876, at 10 o'clock a. m., on the premises.
6 Previous to meeting, you will assemble in my office and take the proper oath in such case provided.

(Signed)

H. LEONARD, *Sheriff.*

The above-named juror, Chauncy Krum, failing to appear at the time named in the within notice, and act as such juror, in pursuance of the statute I thereupon summoned John Lambert, in place of said Chauncy Krum, to complete the said pannel.

(Signed)

HARVEY LEONARD,
Sheriff,
By N. LEONARD, *Deputy.*

(Sheriff's certificate of service of notice on said appraisers.)

And on the same day, to wit, September 7th, 1876, said sheriff served on said appellees a notice of the appointment of said appraisers, or commissioners, and of the time when they would meet for the purpose of inspecting said premises to be so assessed, which notice is in words and figures following, to wit:

STATE OF IOWA,
Scott County, ss:

To Renwick, Shaw & Crossett (and others):

GENTLEMEN: Take notice that in pursuance of title 10, chapter 4, of the code of Iowa, of 1873, the sheriff of Scott County has appointed John R. Boyle, Horace Bradley, John M. Eldridge, Chauncy Krum, Gustave Schnitger, and James Baker, freeholders of Scott County, commissioners to examine and inspect, and assess, any damages which you may sustain by reason of the appropriation of certain lands belonging to you, named in the petition presented to said sheriff, to the use and construction of the Davenport & Northwestern Railway, in Scott County, Iowa. The said commissioners will meet on the
7 14th day of September, 1876, at 10 o'clock in the forenoon, to inspect said premises to be assessed.

THE DAVENPORT & NORTHWESTERN RAILWAY CO.,
By JAMES GRANT, *Attorney.*

(Signed) H. LEONARD, *Sheriff.*

And thereafter, to wit: September 14th, 1876, prior to the proceeding to inspect and appraise said premises, the oath required by statute in such cases was administered to said appraisers: Lambert, Boyle, Schnitger, Baker, Eldridge, and Bradley, as follows, to wit:

STATE OF IOWA,
Scott County, ss:

We, John Lambert, John R. Boyle, Gustave Schnitger, James Baker, John M. Eldridge, and Horace Bradley, being each duly sworn, do say, and each for himself says that he will well and truly assess and appraise all damages for land to be taken, to the owners of real estate in Scott County, State of Iowa, to be taken and appropriated by the Davenport & Northwestern Railway Company, to be condemned for the purposes of said road, under the provisions of chapter 4, title 10, of the Code of Iowa, to the best of our knowledge and ability, and impartially between said railway and the owners of said real estate.

(Signed) JOHN LAMBERT.
JAMES BAKER.
HORACE BRADLEY.
JOHN R. BOYLE.
J. M. ELDRIDGE.
GUS. SCHNITGER.

Sworn to before me, and subscribed in my presence by John Lambert, John R. Boyle, Jas. Baker, J. M. Eldridge, Horace Bradley, and Gus. Schnitger, this 14th day of September, 1876.

(Signed) W. H. GABBERT,
Clerk of the District Court of Scott Co., Iowa.

And subsequently, on the same day, at the hour of 10 o'clock
8 a. m., said appraisers met on said premises, in pursuance of notice theretofore given, for the purpose of assessing the damages which said appellees would sustain by reason of the appropriation of the strip of land in said petition described, and assessed the damage of said appellees at $500, and reported their proceedings to said sheriff, which said report is in words and figures following, to wit:

In the matter of damages sustained by Renwick, Shaw & Crossett, by reason of the appropriation of certain lands by the Davenport & Northwestern R'y Company.

To the Sheriff of Scott County, Iowa:

The undersigned, duly appointed commissioners to assess the damages which will be sustained by the lessees of said land in said county, by reason of the appropriation thereof by the Davenport & Northwestern Railway Company, for the purpose of the construction of the railroad of said company, respectfully report: that in pursuance of the annexed notice, they met at the following described premises, on the 14th day of September, 1876, at the hour of 10 o'clock in the forenoon, for the purpose of assessing the damages which Renwick, Shaw & Crossett would sustain by reason of the appropriation by said company of a strip of land on the bank of the Mississippi River adjoining the following described tract of land owned by them as lessees, in said county, to wit:

A strip of land not exceeding 100 feet in width, on the Mississippi River, between high and low water mark in the city of Davenport, in front of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, in block 1, of Churchill's Addition to Davenport.

And in front of the following tract of land, in said city, adjoining the said lots, beginning in Le Claire's reservation, on the Mississippi River bank, at the southwest corner of Churchill's Addition; thence north 396 feet; thence west 330 feet; thence south 660 feet; thence

9 east, following the meanders of the river, to the place of beginning, lying along the line of location of the Davenport & Northwestern Railway, from where it leaves the lands of Daniel Gould, station No. 150+22 to station No. 163+20, and lying above low water and south of a line parallel to said line of location of said road, and distant northerly from said line of location forty (40) feet for the first 1028 feet of length, or from station No. 150+22 to station No. 160+50, and for the remaining 270 feet of length, or from station No. 160+50 to 163+20, thirty (30) feet northerly from said line of location.

And having been first duly sworn faithfully and impartially to assess all such damages, and it appearing that Renwick, Shaw & Crossett had been duly notified according to the statute in such case made and provided, we proceeded to inspect said tract of land and the location of the railroad of said company, as marked and designated by the engineers thereof, and we find that said company have taken and appropriated a strip of land as heretofore designated, for right of way along the bank of the Mississippi River, between high and low water line, in front of the above described tract of land, as shown by the maps and plats of the survey thereof, and we do assess the damages of the said Renwick, Shaw & Crossett by, reason thereof, at the sum of five hundred dollars.

Respectfully reported, this 14th day of September, 1876.

(Signed) JOHN LAMBERT,
J. M. ELDRIDGE,
GUS. SCHNITGER,
JOHN R. BOYLE,
JAMES BAKER,
HORACE BRADLEY,
Commissioners.

That on September 21st, 1876, said appellant (railway company) served on said appellees (Renwick, Shaw & Crossott) a notice to vacate
10 the said right of way, condemned as aforesaid, after having deposited with said sheriff the amount of said assessment, which notice is as follows, to wit:

Notice.

To Renwick, Shaw & Crossett (and others):

You are hereby notified that the commissioners, appointed by the sheriff of Scott County for that purpose, have viewed the premises described hereinafter, and assessed your damages thereto, by reason of the same being taken for right of way by the Davenport & Northwestern Railway Company, at: William Renwick, $1,700; Renwick, Shaw & Crossett. $500—$2,200, which sum has been deposited with the said sheriff for your benefit, as required by law.

That the said railway company is now ready to occupy said premises, and you are notified forthwith to remove therefrom all of your lumber, rafts, or any and all other property of any kind whatever which you may have, or in which you have any interest, from the said premises; said line is described as follows, to wit: all that part of lot 12, block 25, A. C. Fulton's replat of a part of section 25, township 78 north, range 3 east of 5th p. m., in the city of Davenport, lying north of a straight line, cutting the east line of said lot at a point 40 feet south from its northeast corner, and cutting the west line of said lot at a point 44½ feet south from its northwest corner, as shown by the maps and plats of the

survey thereof. Damages assessed at $250. And all that part of lot 4, block 25, A. C. Fulton's replat of a part of section 25, township 78 north, range 3 east of the 5th p. m., in the city of Davenport, lying north of a straight line, cutting the east line of said lot at a point 81 feet south from its northeast corner, and cutting the west line of said lot at a point 87½ feet south from its northwest corner, as shown by the map and plats of the survey thereof. Damages assessed at $400.

11 That part of lot 2, block 28, of the replat of block 28 of A. C. Fulton's river lots in the city of Davenport, lying south of a line parallel to and 25 feet northerly from the center line of the main track of the Davenport & Northwestern Railway, crossing the east line of said lots 117½ feet from the northeast corner and the west line of said lots at a point 125 feet south from its northwest corner, as shown by the maps and plats of the survey thereof. Damages assessed at $50.

And a strip of land not exceeding 100 feet in width, in the Mississippi River, between high and low water mark, in the city of Davenport, in front of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, in block 1 of Churchill's addition to Davenport, and in front of the following tract of land in said city, adjoining the said lots, beginning in Le Claire's reservation on the Mississippi River bank, at the southwest corner of Churchill's addition; thence north 396 feet; thence west 330 feet; thence south 660 feet; thence east, following the meandering of the river, to the place of the beginning, lying along the line of location of the Davenport & Northwestern Railway, from where it leaves the land of Daniel Gould, station No. 150+22, to station No. 163+20, and lying above low-water line and south of a line parallel to said line of location of said road, and distant northerly from said line of location forty (40) feet, for the first ten hundred and twenty-eight feet of length, or from station No. 150+22 to station No. 160+50, and for the remaining two hundred and seventy feet of length, or from station No. 160+50 to 163+20, thirty (30) feet northerly from said line of location, as shown by the maps and plats of the survey thereof. Damages assessed at $1,000. All of the foregoing damages assessed to Wm. Renwick.

And damages assessed to Renwick, Shaw & Crossett, by reason
12 of the location and building of the said railway along the line last above described, below high-water mark, assessed at $500.

THE DAVENPORT & NORTHWESTERN RAILWAY CO.,
By JAMES GRANT, *its Attorney.*

And thereafter, to wit, September 25th, 1876, the appellant appealed from said report of said appraisers, and served its notice thereof on said sheriff and said appellees, to the circuit court of Scott County, Iowa, which said notice, filed with said sheriff at the date aforesaid, is in words following to wit:

In the circuit court of Scott County, Iowa.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILWAY CO.

To the said plaintiffs and the sheriff of Scott Co., Iowa:

You are hereby notified that the Davenport & Northwestern Railway Company has appealed to the circuit court of Scott County, Iowa, from the assessment of damages resulting to said Renwick, Shaw & Crossett,

as the lessees of certain land lying along the bank of the Mississippi River, in the city of Davenport, Iowa, and in said company's petition to the sheriff more particularly described, by reason of the appropriation by said railway company for its right of way of a strip of land not exceeding one hundred feet in width, between high and low water mark of said Mississippi River, along the south side of said leased land, which said assessment was made by said commissioners, appointed by the sheriff of Scott County, Iowa, on the 14th day of September, A. D. 1876.

That said railway company will claim that said Renwick, Shaw & Crossett have no interest in said land between high and low
13 water mark, and have suffered no damage whatever from the appropriation of said strip of land for right of way of said railroad company.

You are further notified that said appeal will come on for hearing before the circuit court of Scott County, Iowa, at its next term, which will commence on the 28th day of October, A. D. 1876.

THE DAVENPORT & NORTHWESTERN RAILROAD Co.,
By JAMES GRANT, *Its Attorney.*

Due and legal service accepted this 25th day of September, 1876.
(Signed) H. LEONARD, *Sheriff.*

(Certificate of service by said sheriff on appellees, Renwick, Shaw & Crossett.)

During the progress of the trial of said cause said appellant on motion filed (on March 21st and 22d) its three amendments to said condemnation proceedings hereinafter noticed in the abstract of the evidence, when offered and allowed filed. Which said amendments are in words following, to wit: (See p. 22.)

Application for assessment of damages.

Scott circuit court, March term, 1878.

IN THE MATTER OF RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILWAY Co.

The said defendants, The Davenport & Northwestern Railway Company, make this amendment and addition to their application:

1. The said railway company limits the line which it applies to condemn entirely to a space not exceeding one hundred feet, between high and low water, and if at any part of the boundary on the north of
14 the line they seek to condemn extends beyond high-water mark, they do not ask to condemn or appropriate that part.

They also aver that though said Renwick, Shaw & Crossett claim to be riparian owners, that they are not riparian owners, and their title in fee does not extend to the high-water mark, on or in front of the land between high and low water mark sought to be appropriated.

GRANT & GRANT,
BILLS & BLOCK,
For Appellant.

(Marked filed March 21st, 1878.)

Scott circuit court for the State of Iowa.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILway Co. (See p. 34.)

Now come the defendants and ask leave to amend the description of the land sought to be appraised between high and low water mark, as follows:

The said defendants ask to appropriate and take the right of way for a single track railroad along the premises claimed by the plaintiffs, described as follows: taking the center of the located line of the proposed railway as located and now built, and to extend south of said located line in the river forty feet from the said center line and no farther south of said center line, and the space south of said center line as located and built to be limited to forty feet south thereof, according to the curve of the line as located; and the said land in the north of said center line, beginning at the east line of said lands claimed by Renwick, not to exceed forty feet north of said center line of said railway as located and built, running west until it reaches the mill of the plaintiffs, and from the point where it reaches the mill running west to the west line of the premises claimed by plaintiff, not to exceed thirty feet, and the whole of the land and right to be appraised to be within high and low water mark of the Mississippi River, in front of said premises. And defendants allege that they have not taken, appropriated, or meddled with any part of the said space excluded by this amendment, but only of the land which we herein ask to use.

GRANT & GRANT,
BILLS & BLOCK,
For Defendant.

In the circuit court of Scott County, for the district of Iowa.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILWAY Co. (See p. 35.)

Now come the defendants and make the following further amendment to the claim for property to be appraised, and says that the defendant is authorized by an ordinance of the city of Davenport to build and use only a single track railroad along the river bank in front of the property claimed by plaintiffs, and that it has accepted all the *the* terms of said ordinance, and that it seeks to appropriate and use for its right of way land between high and low water mark for a single track railroad; that said company prays to assess damages for said single track railway, to be built in a reasonable and proper manner, with an opening under the same over the log-way, which is now used to carry logs from the river to plaintiffs' saw-mill, eight feet wide and four and a half feet high in the clear, over and above said log-way, with sufficient width and depth to enable the plaintiffs always to draw logs from the river to their mill under the track of said railway, and also build said single track with sufficient culverts and drains, constructed in a reasonable and proper manner, under and through the track of said railway so as to drain the surface-water from the premises claimed by the

16 plaintiffs, and to allow full and sufficient access to the water of the river from the premises claimed by the plaintiffs, as the embankment of the said railroad is now built or may at all times required to be built by the law of the land and the ordinance of the city council of the city of Davenport, under which said road was organized to be built, and built in front of the premises claimed by the plaintiff.

GRANT & GRANT,
BILLS & BLOCK,
For Defendant.

(Marked, filed March 22d, 1878.)

In Scott circuit court.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILWAY Co. } No. 2591.

Now comes said defendant and asks leave of court to file the following amendments in this cause or proceeding, to wit, the amendment offered with this motion, this 22d day of March, 1878. (See p. 14.)

GRANT & GRANT,
BILLS & BLOCK,
For Defendant.

(Marked, filed March 22d, 1878.)

On March 15th, 1878, this cause came on for trial before Hon. D. W. Ellis, judge, and a jury, duly empaneled, visited the premises in dispute in charge of the sheriff, under instructions of the court, and the appellees (plaintiffs) introduced THOMAS MURRAY, who testified as follows:

Surveyor and civil engineer; been engineer for ten years. (Map shown witness.) I made this map; it shows the Davenport & Northwestern Railroad, river bank, Renwick's saw-mill property,
17 Shield's woolen mills, and Gould's factory. I started in making survey for map from the east end of Renwick's land, or east line of Le Claire's reservation, on south line of Front street, which is here (indicating on map); these two lines are identical; 1,300 feet from this line to river bank. I ran the line north of railroad track, which is forty feet north of center of track down to the mill, and then thirty feet.

Ques. Explain to the jury what these two lines represent here.

(Objected to by appellant because map not offered in evidence, not a public map, and not proven to be correct. Objection overruled; appellant excepts.)

Ans. This line represents south line, Front street; this north red line the bank of the river, and the black line, south of red line, the north line of right of way; the next line the center of the railroad; the black dotted line the foot of the railroad embankment; the next heavy black line the south line of right of way, Davenport & Northwestern Railway; right of way I measured 100 feet wide.

(Map offered in evidence.)

Cross-examination:

This represents north line of railroad ground, and a little below that is river bank. I took the measurements of south line of Front street, and measured south to railroad. Figures in black represent distance

from south line, Front street, to railroad; this black line is south line; the figures from black line to red line are stations, which are five feet apart; the figures 50+52, etc., is the distance from south line, Front street, to north line of right of way, which is taken forty feet from center of track.

(Description of land reported by commissioners read to wit-
18 ness: "A strip of land not exceeding 100 feet in width on the Mississippi River, between high and low water mark, in the city of Davenport.")

I have that line here; it is forty feet from center, thirty feet from here (east line of mill), west; don't know that track is built as it was located; I get this line this corner of the river by extending the line until it intersects the river; this represents low-water mark; I did not establish that point from the survey of Le Claire's line by measuring; I extended his line until it intersected the river; by the field notes it don't go to the river; I have the field notes; the southeast corner of Le Claire's patent don't call for the river, but for a stone at southeast corner; the map as showing east line of saw-mill property, bank of river, and north line of railroad, don't represent that stone; it does not represent the lines of the river, the railroad, or Renwick's mill, with a view to Le Claire's patent; this dotted line is the center of the railroad bank as it is built; I don't know how it was laid out; I took that line as coming within forty feet of the north line, and made the whole distance from these two black lines outside of the dotted line 100 feet; I took it for granted track was built in center of staked land as laid out by engineer when doing work; I mean by measuring forty feet from center of track; I have marked river bank in red; I mean by it the crest of river bank—where it breaks off abruptly—as it was when I surveyed it; the big projection running across the line of railroad marked on map; I do not mean as representing the river bank, and here, Renwick's property; there is no bank here at all; it is filled out over here.

Ques. Well, then, that is no river bank.

Ans. It is the bank as it now is; there is no bank here; this don't represent the bank; that is covered up; the bank proper is there, as it always was; but it is covered up; my line represents the bank as it now appears, but not here; there is no bank here now; our bank
19 commences here; there is a bulk-head built out here, and this is saw-dust slabs and one thing and another; I suppose there is some dirt; but don't know; I don't think I could tell where the river bank was before this saw-dust pile was put in from the bank above and below; this is the natural appearance of the bank at that point and here; I have the field notes of the meanderings; with them I could establish where that line was, if I got that one and this; but these don't represent the field notes; this is intended to represent the appearance of river without regard to field notes; that is enclosed with saw-dust put between the pier, put out into the river.

This angle corner in river bank line is where pier was put out; map represents low water outside of that pier, which is correct; I don't know where low water was before crib was put out; I know nothing about the crib; don't know how long it has been there, nor when it was put in.

I came here to live eleven or twelve years ago; I don't know where high water was before it was put in; this line is intended to represent the bank of the river, not high-water mark; it was within a foot of low water when I measured it; I got the government high and low water

on the draw; this map was made two years ago; the lower line (low water line) I got two years ago when the railroad was being built, in September, 1875, it was then I surveyed this property for the city.

The city map is in my office; I have not high-water mark from the government bridge on map, but can get it; that is top of pile of sawdust; that corner in the line called river bank, from the line of the break of the bank of the river, is 99 feet further south than the bank in front of the mill, north of log-way; I can't give the distance of that point from the natural break of the bank; I know nothing of this bank from here, assuming that the natural line of the bank ran straight
20 from this point to that (above and below bulk-head) I can't answer without making calculation, but would say it was in neighborhood of 100 feet from such straight line to pier; it is 98 feet from corner of mill to crib.

I have not the log-way marked on map; there is one; there is a bottom or foot of the embankment on north side, but I have not got it marked on map.

(Map again offered in evidence, and marked A.) 157.

(Objected to by appellant because it is not a correct map of the premises it pretends to represent; objection overruled; appellant excepts.)

Redirect examination:

This red line shows the crest of the bank as it appeared when this map was made; this line which runs out around here is the course of the line as it appears now of the fill; taking the thirty feet north of the center of the track, and the seventy feet south, this 100 referred to, extends south of it; that is, the bank extends south of this 100 feet; the railroad line east of the mill; line that is forty feet from the center, embraces some part above the crest of the bank, to wit: between stations 72 and 77, and between 78 and 80; at station 75 it extends twenty feet; it is not marked on map; it is about 250 feet from where this north line first strikes the crest, to where it leaves it, between stations 72 and 77; there are two piers; this other one is south of this bulkhead; one is where this red line makes a curve, the other is south of that further down the river, and is not on the map; this fill is some higher around the mill than the surface of the track; this sawdust part that I have been talking of represents a piece of ground in front of the saw-mill property.

Ques. State if you have made a measurement of the amount of the surface, the area of that part next the saw-mill, and running out to the break of the bank.

21 (Objected to by appellant as assuming that there is any ground there; withdrawn.)

By APPELLANT. Do you mean to swear that that is the break of the river bank, that pile of sawdust.

Ans. I mean that is the bank where it is now; the bank or whatever it is.

By APPELLANT. Then we object to the question as above; overruled; appellant excepts.

Ans. There is 408 11-100 of an acre included within the 100 feet, that is outside of the 100 feet, south of it.

I made this map; it is correct.

(Offered in evidence and marked B. P. 157.)

Recross-examination:

It is a correct map of ground in front of mill; I don't know what

it is composed of; it all appears to have been put there by the hand of man; no part of it appears to be under the surface of the river; all this 100 feet is between high and low water mark; I didn't dig down in this pile and don't know what it is in below; I saw it dug down thirty feet north of this, and it was all artificial; I dug some holes to get at the original surface, but have not examined them yet; I passed by them; couldn't tell whether it was natural earth; it was black soil; I have not seen any sawdust below this black soil, but suppose it is there; I did not look closely.

(Appellant moved to exclude witness' testimony on this point, and to prevent map B from going to the jury, because testimony of witness shows whole ground taken by appellant at this point to be between high and low water mark, and map shows railroad to be across artificial bank or filling, between high and low water marks; objection overruled; appellant excepts.)

22 Appellant files amended pleading (hereinbefore set out) limiting right of way to not exceeding 100 feet, between high and low water mark (p. 13). And next, Edward W. Durant, in behalf of appellees, testified as follows:

Have resided in Stillwater, Minnesota, twenty years; been all my life engaged in the lumber business; been cutting, driving, running, and selling logs twenty-five years; was pilot on Mississippi river fifteen years; I am acquainted with that part of the river in Davenport near Renwick's mill; I have landed logs there; I could not give the number of times; years ago, when I was pilot, I landed once or twice; we generally landed with the assistance of rapids' pilots; the water on rapids is low, but navigation anyway is difficult and we got rapids' pilot to assist over the rapids from Le Claire to Davenport; up to eight years ago the system was to bring rafts down entirely in floats with the current; since then that plan is done away with and they are towed now by steamboats.

I have seen and examined the railroad bank in front of Renwick's mill; I was acquainted with the river shore there before that was put in, and have been familiar with the peculiarities of the location for a number of years; before the railroad bank was put there in low water there was an eddy in front which assisted in holding and checking logs, and in high water there was not much of an eddy; in low water this eddy would hold sixty-five to seventy-five feet in width of logs; in very low water, part of the logs would lie on the ground; outside of and including that I have seen probably eight strings of logs there at once; a string is sixteen feet in width.

23 The current would be governed entirely by the stage of the water; when low it would be comparatively slack, when high the current would be stronger; I have seen lying there several times twenty strings of logs, each string twenty-seven feet long by sixteen feet wide, equal to 1,000,000 feet; in estimating logs I put them at eight or nine logs wide and twenty-eight long, and in making the calculation we estimate from 40,000 and 50,000 to as high as 90,000 feet to a string; they average about 50,000 feet; a string of logs is a tier of eight logs wide by twenty-eight logs long; that is the way they are sold and are measured separately; there is an estimated length; for instance take eight logs wide and put twenty of them together and that constitutes a string.

At this point, in low or medium stage of water, the bank was shelving, sloping out, and a little point of land jetting out into the currrent, and in landing logs this point would help somewhat in checking headway of

rafts, so as to land easily; in high-water this was covered up and of no assistance, hence it was easier to land raft in high than in low water; in high water this bank was steep; there were in addition as many as six posts and trees on shore to assist in landing rafts, and to tie to.

Ques. You may state now, if you please, what change has been made there and what effect it has with reference to landing logs there; state fully.

APPELLANT. You mean changes by the railroad.

APPELLEES. Yes.

(Appellant objects on the ground that the railroad is built at that point between high and low water mark entirely, over a part of the river bank, which was in its natural condition when the road was built; and also, because such damages are consequential, incidental, and contingent, and cannot be recovered in this suit; objection overruled; appellant excepts.)

24 [It is hereby agreed between the respective counsel herein that the defendant (appellant) objects to all the testimony tending to prove a claim for damages on account of the road of defendant being laid down between high and low water mark, upon the bank of the Mississippi River, on the ground that the defendant is entitled to lay down its track between high and low water mark, without paying damages to the riparian owners; all such objects are overruled by the court, and the defendant excepts.]

Ans. An embankment has been built thereon in front of that property, and has cut off a portion of the low ground and slack water, but leaving two or three of those points of the low ground still outside of embankment; in high water these points will be all covered up, leaving an embankment of forty-five degrees angle for rafts to land against; the railroad embankment of course cuts off that much width of slack water, laying along for two lengths of a raft before the embankment was put in.

There were several places for fastening logs and tieing rafts to check them. The other day I noticed one; a chain run through the embankment, so that the effect of the embankment at low or medium water is to take up seventy feet of space for length of two rafts, on what was shallow, low, or eddy water.

I have been there when logs were loaded since then; in high water the current is very much stronger outside of this point than it is in low water; the water that runs outside of this indentation in high water is very much stronger than in low water, and the further into the stream the stronger it gets, and the velocity of the current is governed very much by the stage of the water, because just above this is a reef or shoal that checks the flow, and when it is high enough to go over that it is stronger of course than in low water.

25 It would be impossible, I think, to hold as many logs there as before the embankment was built; the embankment narrows down the space to hold logs in, would expose them to a stronger current, and it would be difficult to hold any considerable quantity of logs in a high state of water.

The water now is about three feet below high water; it would be difficult to tell what you could do there in high water; I think the current would be pretty strong, but I have never seen the water high since the embankment was built, but judge by what I know of the past that it would not hold many logs there; you could hold some, but I would not undertake to say how many; the safety of holding them there would depend upon the facility for holding them; a quarter of a raft of logs not

secured would not hold there; you might put them there and have very strong booms to hold them; I can't say how many, but a less quantity than before.

When I speak of what could be held before I take into consideration the posts and trees, and fastenings on the bank to hold them, while now I saw but one chain and it would be a hazardous matter to hold any considerable quantity of logs, say quarter or half a raft.

(Objected to by appellants, because the Supreme Court has decided that a matter of that kind must be decided by a jury in relation to the facilities, the use of the facilities, and not in the condition where there has been an attempt to make the best evidence.)

The COURT. The objection is to the answer.

APPELLANT. Yes.

(Objection overruled; witness may proceed; appellant excepts.)

It would be impossible for me to tell how many logs could be held there now; I have never seen high water since the embankment was made; my judgment is that three or four strings in width would be as much as could be held safely in high water.

26 Ques. You may state what effect, if any, would be made on the landing for logs there, or the log harbor, if the railroad embankment was carried out to line of low-water mark.

(Objected to by appellants on the ground that they seek to recover damages which are contingent, and which may never arise, and because witness has not shown that he knows where ordinary low-water mark is, and because it is the province of the witness to state facts, and of the jury to draw conclusions; objection overruled; appellant excepts.)

Ans. I don't think it would be possible to hold logs there at all.

Ques. State why you think it would not be feasible.

(Objected to by appellant; objection overruled; appellant excepts.)

Ans. Because the current would be too strong.

Ques. State what is the fact as to landing logs there by steamboat now, compared with what it was before this embankment was built.

(Appellant objects, because it is immaterial and incompetent for witness to make comparisons—he must state the facts and the jury make comparisons and draw conclusions; objection overruled; appellant excepts.)

Ans. Would have to drop logs there now in smaller quantities.

Ques. State why in smaller quantities.

(Same objection by appellant overruled; appellant excepts.)

Ans. Before there was an eddy that assisted in checking logs;

27 then they took about one-half a raft; now it would be running a risk to undertake to take more than half that many.

Ques. What was the cost and expense of landing logs at this harbor before this embankment was built?

(Same objection by appellant; objection overruled; appellant excepts.)

Ans. Our charges for delivering logs from Stillwater were $100 a string, from Savannah Bay $20, and from Cattail Bay $15 to $20, according to stage of water.

Ques. What is it since embankment was built?

(Appellant objects because incompetent, immaterial, and damages not such as can be recovered in this suit, and asks for opinion of witness; objection overruled; appellant excepts.)

Ans. Difficult to answer. Last season one of our boats brought a few logs there. I don't know what was paid for those our boat did deliver; don t know they landed them; don't know who took the risk. I saw the

logs before and after delivery. They got logs up to mill by ordinary log-way, which now passes under railroad embankment. Before embankment it was a plain open log-way, with nothing over it. Now logs pass under the railroad track.

Ques. If embankment was solid how could logs be got into mill?

(Appellants object, because incompetent, immaterial, and seeking to prove contingent damages, which are not recoverable; objection overruled; appellant excepts.)

Ans. I know no way but to tunnel under railroad.

Ques. If embankment extended to low-water mark how could logs be got into mill?

(Same objection; same ruling; exception.)

28 Ans. As to feasibility of getting logs through it, I could not tell, until I see it, how it could be done.

Ques. State whether it would be practicable to take logs over this embankment.

(Same objection; same ruling; exception.)

Ans. I don't think it would. There was generally an eddy at this boom; that is, a free current passing by; there is some now. If embankment were built out to low-water, to the end of that pier, there would be a strong current. In that event I don't think logs could be handled there unless there was some breakwater below to detain the current; the current would be too strong.

Ques. State if railroad bank was carried out to low-water mark all along the front what kind of a log-harbor there would be to land and hold logs.

(Appellant makes same objection, and because it don't appear that witness knows where low-water mark is there; objection overruled; appellant excepts.)

Ans. If the bank was run out fifty feet further, I sup' it would be at low-water mark, but I don't know exactly where low-water mark is; a log landed on the outside of that line there in ordinary high water would be insecure, and the same in high water. The water may rise three feet above the rapids, and only one foot on the rapids; I mean by insecure that it would be almost if not quite impracticable to hold any considerable body of logs outside such embankment.

Cross-examination:

Resided at Stillwater twenty years; been running by premises thirty years. I don't know when this pier was put out. I saw rafts landed there before it was built, and landed some; don't think it was in

29 high water, but medium. On one occasion I got a rapids' pilot to come over with me and help land; that was before boats were used for that purpose. If the pier or bulk-head was taken away, map would not be a correct representation of the river shore before it was put there.

There has been some artificial filling put along the shore since mill was built; if all this filling was taken away I would not undertake to say that I could recollect the line of the shore; I don't recollect any projection of the bank at the point where the mill is; I don't recollect any alteration in the natural course in the bank except that filling.

I have seen logs there and landed them; it was considered a place where we had to exercise unusual care in landing; it would be prudent at all times to land raft above and drop down two strings at a time; that has always been the plan of our pilots.

I don't think there has been any change in the current there in high

or low water since mill was built, except what has been made in the immediate vicinity of the pier; that changes it because it would change the under-flow of water; it was at one time an obstruction; since I knew it I don't think there has been any perceptible change in the current in the channel opposite this mill.

I know of no difficulty in holding logs before this bulk-head was built; we always had to use care and precaution; logs are kept in place there against action of wind and water by cribs built of timbers and filled with rocks, and booms attached between the cribs, running up and down the river, covering front of ground occupied by rafts, and some just by booms with lines running longitudinally accross rafts to shore; timber would be two or more feet square, piece-timber 12x12 inches, of different lengths, fastened together so as to present upon the water a flat surface, perhaps of four feet wide, and fastened by
30 sections of chains so as to double up or lengthen as occasion requires, and taken up along the river to prevent waves from carrying logs away; they are four feet wide and float so a man can walk on them; they used to use round logs, and some do now. The above is the plan where water is swift and subject to high winds. Schricker has an achor in the river, and his boom, of single logs fastened together, attached to it; Schricker's is more exposed to wind than Renwick's.

Logs have been lost on account of storms here and elsewhere; except in case of extraordinary storms these booms generally hold logs; I don't know much about how Renwick's boom holds logs; I have noticed his boom every month in the summer for twelve years; the last time I saw logs there they were in one of these log booms; booms are taken out of the river in winter.

I have been at the premises since coming here; did not observe places where boom is fastened; I saw chain spoken of where boom is fastened to shore; I suppose it is strong enough to hold raft; I saw boom there last summer; did not notice it particularly; I didn't see where boom was fastened, but suppose it was 1,000 feet above log-way.

I think it would be some difficulty to hold logs at Renwick's—more than before. They can fasten boom up and hold it; can't say how much strain it would be. High winds throw logs out of boom; that's chief cause of their getting away.

Opposite Renwick's I think current stronger on this than other side of the river; we run on other side with rafts boats and in preference to this side, because we think it safer; cutting the channel has made some difference, but on the other side we can go through the draw with comparative safety; I formerly came down this side, and ran very
31 close to Renwick's, as near as I could with safety, say within two to five rods, so as to run between the bridge and pier; I never hit his pier, but it has been done by a raft floating down.

I landed rafts at Renwick's in medium water; had to use care, as it was just above the bridge, and if we missed it would be disastrous; our firm put logs there last fall, but it was low water, and we had to use a light boat; Stubb's Eddy is a large body of water in East Davenport, where current is slack, and easy place to land; we usually stopped there, split them in two pieces, and dropped them down one-half at a time; it is not far from this mill.

I never tried to land at Renwick's in high water, but think it a doubtful experiment; it could be done at present stage of water. If embankment was carried out to line spoken of, I think the current would be increased some; I don't know that the general current would be increased

much, but think it would sweep by there with more force. I can't tell how much it would be increased; I could not tell the difference in swiftness of the current there in high and low water; it would take instruments to tell. Opposite Renwick's we assume the current to be five and a half to six miles an hour, in high water. I didn't notice it before bulkhead was built. We used to come over the rapids in the night, but since the bridge was built we come down on this side near to Renwick's. We used to have two boats to land at Renwick's; one at each end of raft; one pushed and the other pulled, and two lines put out to the shore to hold it up. If ordinary water, we came in with half a raft and one boat; when we went to land we had place to fasten lines to, which were posts and trees referred to. The posts were quite a distance above, near Gould's factory, and may be some above that; they are on
the shore side of the embankment; they are used to both check
32 and tie the raft; with posts accessible on river side of embankment above Gould's and Shield's, and a strong boat, I suppose you might stop a raft. I have seen logs there, but never saw them landed there in high water. Difficulty from high water now and before embankment would be same.

In my opinion, with embankment built out fifty feet it would not be very practicable to hold or land logs in high water. I think the logs would sink there; I think it would break them apart and sink them under the boom, even in medium high water; water don't get as high on the rapids as elsewhere. I don't think fifty feet would go outside of that pier; that pier makes an eddy; but if only twenty-five feet projected in high water, it would throw the water upon the crib, and throw it out. There would be no eddy; it would make an eddy if you ran it out far enough to make a dam, just as it is now. The eddy now is both above and below the pier.

I don't belong to the Boom Company of Stillwater, I belong to Log Company of Durant & Co. In high and low water this railroad bank lessens the space and displaces water; there is less eddy. There is more eddy in high than in low water. The bank occupies a part of the ground and slack-water where logs used to lay. Where embankment on dry ground don't change water except in high water. Six strings occupy ninety feet; I didn't measure it, but suppose the break of the bank of the river is sixty or sixty-five feet from outside of embankment. The ninety feet referred to take up this and part of the bank, and slack-water outside of the embankment; about four and a half strings could be put where embankment is in high water. You could not put as many down near the mill as above.

We took some logs, seven or eight strings, there once since the
33 embankment, in low water, dropped them in with a small boat, and got through all right; not many there then; water was low and logs scarce. I was there four or five days after; didn't notice whether they were up to the slope of the bank; some of them were sawed up; I didn't know of embankment until I got there, and paid no particular attention to it; the mill was running; they were taking logs up then. I am familiar with the saw-mills at Burlington, and with the one where railroad track is between the mill and river.

Ques. Is there any trouble getting the logs to that mill? I want to know if you noticed how they got them there.

(Objected to; objection sustained, and appellant excepts.)

Ans. I know of no other similarly located mill, except at Burlington; we run logs over rapids in extreme low water by means of boats; with boats we can run in channel at all seasons; water is deeper there; can

get to Renwick's in low water; I should suppose it would be more convenient for use of mill at Renwick's, or any mill, to leave logs out in river rather than on shore; it is better for sawing to keep logs in water than on shore.

Redirect examination:

I don't think a boom line without lines to shore would hold logs at Renwick's; I saw no posts or other fastenings there than the chain spoken of outside embankment; we had no what is called high water last season; it was medium or low from early in July to close of navigation; I don't know the depth of water in front of Renwick's; there the main channel is two-thirds across river, on other side, and our rafts run either in or near that channel; we sometimes pass
34 through bridge on this side, but our orders are, and it is safer, to go through on other side; I think the majority ran through the 250 foot span this side of drawer; it was not a common thing for them to run this side; I saw them pass through twenty times during the season; I have seen them pass this side; I don't think they run any log rafts by hand now; boat lends to safety of raft, and helps to navigate and land it.

(Appellant offers to file amendment to petition or application for right of way, limiting the same to ground now occupied. Objected by appellees, on ground that they cannot make any change or amendment; that the statute does not contemplate and don't provide or allow for it. Objection sustained; appellant excepts. P. 128. See p. 14.)

A. F. JENKS testified for appellees as follows:

Reside at Albany, Ill.; have been engaged in handling logs and lumber on the Mississippi River since 1855; have been running several years with boats, and have run as high as twenty rafts in one season; am somewhat acquainted with Renwick's mill; I have landed logs there before embankment was built, before embankment landing varied with the stage of water; it was harder landing in high than in low water; the strength of the current made the difference; there were posts and trees on the bank to tie to; in high water there was a bend in the river from above high tide on the point, and the water would swing in under the point, and when the water was reasonably high there was an eddy along the shore, and the water was slacker than it was further out; I never considered it safe to land a whole raft there at once; I used to land half a raft at a time; this point and projection here (on map) had
35 something to do with eddy, and water inside was slacker than outside; my recollection of eddy is that it extended half the width of a piece when landing; one-half a raft would be 125 to 135 feet wide, and the eddy would extend out perhaps more than one-half the width of it—from 75 to 100 feet wide; the inside is slack; outside the current is pretty swift—I can't say how fast; this part of the river is what is known as the rapids; water is swifter on rapids than most any other place, and swifter there than any other place on the rapids; I have examined the premises and landed rafts there since embankment was built; last full water was low, and I landed one-half raft as before spoken of.

Ques. You may state to the jury how the landing would be changed, and the log harbor, by extending the railroad embankment out to the line of low-water mark, indicated on the map shown to you by this blue line.

(Appellant objects, because it had no authority to make any such

extension of its embankment, and it seeks to prove damages which are consequential and contingent, and it is immaterial and incompetent. Objection overruled; appellant excepts.

Appellant here offers to file amendment to petition so as to limit its right of way to space between high and *and* low water mark to foot of present grade, to be described in said amendment. Appellees object; objection overruled; appellees except.)

(See amendment set out in full in pleadings, Abstract P. See p. 15.)

Answer to above question. At low water don't think landing materially affected, because current is not so strong; the higher the
36 water the stronger the current and more difficult to land; in very high water I don't think it would be possible to land there; a raft might be made strong enough to land anywhere, I suppose; I have never landed them in high water since the embankment was put there, but I don't think, as our rafts are usually made, they would be strong enough to land in the current; been no high water since the embankment was built; the difference between the present stage and low water would not be much; the further you go into the river the stronger the water, until you get to a certain point; there is not much difference between what it is now than if the embankment was built out to that line.

The embankment makes it smooth, and in very high water it would rush right along beside it, as it is now; if embankment were built out to that line a raft might be made strong enough to hold it there, and if it could be landed it could be held; in low water, embankment would not materially affect landing, because there is a point or shoal above here, and the water don't run as strong, has a different current, and at low water it would not affect the current; we think it helps to land when we can get raft against the shore, as any friction tends to check it; the friction would be less if shore was sloping; raft would have to be strong enough without aid of friction to hold it together; with bank at an angle of forty-five degrees it would be more difficult to land; before embankment we could land half a raft, and in high water I would not want to land a raft there at all. A raft can be held if it can be landed; perhaps one-half a raft less of logs could be held with the embankment than without; half a raft is six to eight strings, sixteen and eighteen to twenty feet wide, making 125 to 140 and 150 feet wide, and 500 feet long; they would vary some.

37 CROSS-EXAMINATION.

I don't know distance from high-water mark to center of railroad-track, nor distance from center of road-bed to foot of the embankment. Assuming it to be forty feet from shore to center of embankment, and forty more to the slope, that would be only eighty feet wide, and hold only eighty feet of strings of logs, and you can't put half a raft in eighty feet. I remember to have landed half a raft just up against those trees, and tied to them, and judged from where the trees were to outside embankment was enough to hold half a raft; it was high water; trees were right on the break of the bank; I judge a raft would have gone to outside of embankment, but I don't know distance between. I hardly think half a raft landed there before embankment would all be in eddy; I really could not tell what makes an eddy.

I landed a half raft there since embankment; I have never landed there in high water; there was no difficulty when I landed on account of embankment. A raft would not come against the embankment all

the way, as it is now. There are points of land projecting out, and there is not water enough there, and for that reason embankment don't interfere with landing in low water.

I don't know the present stage of water. There is some difficulty there in high water at all times, on account of the current. The embankment throws a raft further into the river and in the strong water. We land now by hitching a boat behind the raft and backing into shore, and hitch shore line to snubbing-posts, trees, chain with ring, or anything provided on shore. If boom was wide and deep enough you could hold a raft there in high water; no ordinary boom would hold; they would run under an ordinary boom.

38 I can't tell the average period of high water. In low water, and until it gets up on embankment, there is no trouble; after it gets up there, the higher the water the more difficulty. Have never seen the effect of high water on the embankment, or of embankment on high water. As the embankment and pier are now, I don't think it would make much of an eddy above in high water. I don't know that there was any eddy there before the pier was put in. I don't know the condition of the shore there before the pier was put in. Don't know when the pier was put in. I have been on the river twenty years. I should think there was difficulty in holding logs above the mill where the railroad leaves the river, and below the brewery, all along there for two lengths of a raft; I never saw a raft landed. I don't know exactly where the brewery is, but don't think I ever saw a raft landed there; we sometimes have snubbing-posts a long way above where we land. I know the water is very swift along there. I say a raft can be fixed to land any place. I am familiar with landings at St. Louis, and have frequently landed rafts there; water is not so swift there as it would be outside of this embankment in high water. Depth of water don't affect landing a raft unless it affects the current. I have noticed the effect a steamboat has on shallow water; don't think a raft has the same effect; with same power a steamboat will run faster and easier in deep than in shallow water, but don't know whether it would follow as to landing boat or raft. A boat displaces a quantity of water equal to the space occupied by its hull, and the ease with which it displaces it, depends on the facility with which it can throw it out of its way. I don't know that that applies to rafts. Wherever a boat or raft goes it has *it has* to displace water; it can't move without; but it is a mere matter of opinion, and I don't wan't to express one, whether it is true that

39 the greater space you have on the sides the easier it moves, because it displaces the water.

DE FOREST DORRANCE testified for appellees:

Reside in Le Claire; acted as rapids pilot since 1864, running on the river; am acquainted with the river front and river at Renwick's mill; have landed logs there a great many times, and ever since they were towed with boats; never landed any there that were floated, but have been on rafts plying an oar, and landed small pieces, but was not acting as pilot. It was never a good landing place for logs; the water is swift; they had ring bolts and posts and lines to assist in landing that are covered up by the embankment. A man from the raft goes ashore and ties a rope to a ring-bolt or post, and a man on the raft snubs the raft, and the boat backs and goes ahead, as occasion requires, and the pilot uses a rudder for floating raft in or out to prevent its striking the shore hard and breaking the raft. The higher the water the more caution must be used—more line across fore and aft the raft passing around

logs and to windlass bolts. The current runs down off Moline chain into the bend of the river. The water leaves Moline chain where it is very swift, comes down here into Stubb's eddy; then in this bend at Hornby's mill, and then the channel comes right out here in this shape; here it opens in and turns the chain, and runs down in this chain.

We call this Schoemaker's chain; some call it the Rock Island chain. It is opposite the water works and Hornby's mill. I have seen the water not over six inches deep on this chain; then this chain of rocks throws the water off into the boat channel, which opposite Renwick's is
40 about fifteen hundred feet straight out into the river. In very low water there is no water scarcely on this chain; the water goes to the channel where it is four or five feet deep for a width of two hunhundred feet or more. Now, when the water is high, it pays no attention to the channel, and runs right around here in this bend. It follows the channel straight around to Renwick's, and makes it very swift. It don't come by Stubb's eddy, but straight across to Price & Hornby's, and follows the bank down. It is three times as swift there as in low water.

These posts and ring-bolts are used to hold rafts after landed also. If a raft is not rafted good it requires a great many lines to hold it; and if it lays up six months to two years the locks, &c., that hold down the binders rot, and it requires more lines to hold a raft together. We genenrally have fifteen to eighteen windlass or cross-lines, fore and aft lines, one on each side of raft, and windlass in, that tightens it up solid; then we have an "A" line from checking works running over corner of raft to keep check works from pulling out when they are snubbing.

There is not much of an eddy there—some little close to the dyke or bulk-head; some below the mill or above it. There was more eddy before the embankment was built than there is now, than there will be when water gets upon the side of the embankment. There was considerable curve in the bank just above the mill, and the eddy there depended on the stage of water. In high water there was a full current all along there. I landed logs there in high water before the embankment—landed some there last fall in low water. There is a good deal of change there by the embankment. The bank is steep, and it is difficult for a man to handle himself there, and tie lines with a raft running swift
41 down stream, and difficult to get lines on to a raft, and there are no posts or places to tie to. There is one chain, but I don't know how it is fastened—it is under ground, so you can't see it; I guess it is tied to a ring-bolt and run through embankment. Then there posts above Gould's factory; there are none on Renwick's premises on river side; some on the other side, but they could not be used in snubbing, because they are below top of bank, and rope over the track would slip over the top of the posts. If tied at top, posts would pull over, and if you run across the track, cars might come along and cut the ropes. Embankment makes no change in current in low water. There has been no high water since it was built, (referring to the current since the embankment was built.)

Ques. How is it in high water?

(Appellant objects, on the ground that it is a mere matter of opinion. Objection overruled; appellant excepts.)

Ans. The embankment extends out above this bulkhead; I should think from high water mark to outside of slope of bank something like 120 feet; I have not measured it, but am pretty good at guessing.

(Appellant objects to witness guessing at distance when there is a

map in evidence which gives it. Objection overruled; appellant excepts.)

I judge at that place it is 120 feet, and further up it is not so far (speaking of high water).

Ques. You may state what, in your opinion, the current would be there since the embankment.

(Appellant objects, as incompetent and immaterial; objection overruled; appellant excepts.)

Ans. The current would be three times as strong there in high
42 as it is in low water; the railroad has thrown rocks on embankment, which have slid down into the river, and the edge of a raft that came close to shore sometimes caught on these and tore out some logs, but we generally manage to keep logs inside and get them down to mill; we have never lost any logs yet since embankment was put there, but they are awkward things to climb over and handle lines and carry poles; the current in high water is about the same for landing a raft now as it was before embankment was put there.

Ques. What do you say about landing logs there in high water since the embankment is there?

(Appellant gave same objection—it relates to contingent and consequential damages; objection overruled; appellant excepts.)

Ans. It would require more hitching and snubbing posts and posts or rings put in embankment, and then I don't know that a raft would hold together if stopped in high water; we might tie it so it would stay, but it would take a good many lines, etc.

Ques. State the difficulty in landing logs there in high water since the embankment has been put there.

(Appellant gave same objection; objection overruled; appellant excepts.)

Ans. The lower end of raft would be further out in the river, and the current is stronger in high water, and sometimes, when the current is too strong, stern of raft will sink; I have seen them sink that way on Sycamore chain, and suppose they would do so here; they use booms for holding rafts on river; I suppose a boom could be fastened up in that
current by putting ring-bolt in bottom of river to hold it straight
43 up in current, so as to let part of raft down inside of it; I don't think an anchor would do there very well; in very high water, I think the loose logs could not be held, as they would sink and go under the boom; large waves shake a raft up, and there are more or less of loose logs; they sometimes sink, and sometimes roll out end over end; I have known them to roll out of this boom; the further you get out into the river, the straighter the current and swifter tha water; I have landed as many as four or five rafts at Renwick's in a season; I have seen at Renwick's as many as two rafts at one time—two pieces lying one upon another; four half rafts in all, each piece 500 feet long; that is, half a raft wide, and four rafts in length; right in that bend we sometimes dropped in a second piece, and lapped it over.

Cross-examination:

Ever since I can recollect there have been two piers at Renwick's. I never saw any raft split on it—I never floated rafts there as pilot. I was oarsman on float that landed there under old man Rambo as pilot. It is not a good landing place; too swift. In low water the water from Moline chain comes down to Hornby's and comes around with the channel, but in high water it runs over the walls of the channel. I don't know in what part of the river the water is the swiftest, it depends on

circumstances. There may be several channels—the swiftest water is not always in the channel. The channel sometimes runs around in a bend, or in an eddy, and there be no current at all. The fastest water is not necessarily where the channel is deepest and widest. You can confine a channel in a narrow shoot, and it will run very fast. I have floated over rapids in three hours in high water, and it took nine hours in low water. Opposite Renwick's mill the river runs from three
44 to nine miles an hour—I timed it myself from the starch factory to the old bridge—it is three miles, and I floated it in twenty minutes; I would not swear it is three miles; I am not an engineer. I don't think that I can measure the swiftness of the current better than experienced and educated engineers, but there is a good many of them that's bought. If we rapids pilots had cut the channel on the rapids we would have had it wide enough to tow a raft in low water without an extra boat, and straighter than it is. As to whether water is swifter in middle of channel than near the shore; everything else being equal, and the channel being equally deep, it depends upon where the channel runs, and its shape, and the wind changes it. It is no swifter in the middle than at the shore. The current don't draw to the shore in low water, like it does in high. In high water it runs over Schumaker's chain, and is swifter at shore than out in the channel. The government deepened the channel opposite Donahue's cut out, some from both sides the channel, and cut off end of chain to enable the water to go a little straighter in the channel. It gives the water better opportunity to stay in the channel in low water, but don't in high, as it then runs out to the bank everywhere; because where it is raising, the water runs down in the middle of the river and forces it out, but it may not be any swifter in the center than towards each shore. When rising, the water is highest in center of stream, and its pressure forces water out—when falling it runs in because it runs out from these streams—but in high water the current is swiftest at Renwick's, because it leaves the channel and runs over Schumaker's chain, and down the shore. When pretty high the water would be in five or six feet of the top of embankment, and with posts in the embankment, and water swift, it is quick work to snub there. We check up a raft and then send a man, sometimes more,
45 ashore with a line, and sometimes two to snub. I suppose with a strong raft and plenty of lines we could stop a raft in a current running five miles an hour.

I have landed at Renwick's in high water; can't tell how often, but I missed it once with six strings of very heavy logs, can't tell exactly when, but before this embankment was built. The water was swift before the embankment, now it throws you further out in river where it gets stronger. Ring bolt in bottom of the river is better than an anchor. Ice might take anchor off, besides I have known them to drag two hundred yards when tieing to them, even where there was a rock bottom. I have broken the fluke off of a good sized anchor. Booms could be fastened to shore, but chains would have to be low enough to let raft pass over, or else fasten out in river to let raft pass in.

Where water is deepest, waves do most damage to rafts anchored up—where water is shallow there is not over eighteen inches of swell and do no damage to raft; and at Renwick's the swells never bother, except in extreme high water. A log is fourteen feet long, 12, 14, 16, and 18 strings make a raft, and we some times peddle them out, one or more strings at a place, so that our rafts get smaller as we go down. Fourteen strings is only an ordinary raft. Strings vary in width from eight

to thirteen logs wide. We count a log two feet, but I have seen them measure eighteen to twenty feet to a string.

I put in several pieces there last season, most of them small—I could not put in a full half raft because water on the chain was so low I could not get in. The embankment didn't bother then.

Schumaker's chain commences at pier, at Donahue's, and goes clear to woolen mills, and can't put logs there in low water; can in
46 higher, but it's hard work to stop them there. It is swifter on this chain than at Renwick's. This chain has same effect on water as a dam in low water, but when water is four or five feet deep it has not the same effect, because it runs over swifter; water is always swiftest on top; a float put in and sunk under water above Schumaker's chain would not follow the channel when it got there, but would sink right down.

Redirect-examination:

Of late years there has been no low water in the river here except in the fall; sometimes a month and sometimes two, or a little more; the rest high water or an average stage; high water averages about five months; it don't remain very high or bank full only a few days at a time; never noticed how often it does that in a season.

J. G. SUTER testifies for appellees:

Live in Le Claire; am rapids pilot, licensed; Dorrance is also; I run from Le Claire to Davenport and Rock Island; I have landed at Renwick's before and since embankment; can't tell how many times, but not many. Been pilot since 1856; am slightly acquainted with river and landing at Renwick's; I used to land there with floats before boats were used; I don't know how many posts there are there to tie to, but there were plenty of trees; there was slack water there the size of the bend; this slack water had a good deal of effect towards stopping a raft; we had out two lines to stop raft there.

I could not tell the size or quantity of the eddy; I landed a half raft and I don't think over two or three strings lay outside of eddy; the current was stronger about inside of embankment at top, I think. I
47 saw no trouble landing there last fall, and since embankment; there is no trouble when there is anything to tie to. I saw no posts on Renwick's, only back over embankment, but some just above; I saw a chain through embankment. We used one or two chains.

Ques. State how it is in high water since that embankment was put there.

(Appellant objects; it is a matter of opinion; it don't appear that witness has landed any raft there in high water since the embankment; objection overruled; appellant excepts.)

Ans. In my opinion, we would not stop a raft there; I think they would go under the boom. I have seen them go out at Renwick's. Five to twelve strings is half a raft; sixteen feet is an average string.

Ques. Well, is there a distance of 120 feet from the embankment out in the river? State to the jury what would be the character of the current there in high water.

(Appellant offered same objection. Overruled and excepted.)

Ans. I don't think they would hold them with any boom I ever saw around here.

Cross-examination:

High water (not extremely high) will average two months in a year. At Le Claire the average rise and fall of water is thirteen feet. I don't

know what it is here. The water is over half bed now; I don't call that high. It is called eighteen miles over the rapids. Can land raft easier in bad place with boat than by hand. I don't think a raft would
48 stay on that bank; the logs would sink and go under the raft in high water—say six or seven feet higher than it is now. Some logs float up better than others. Five miles an hour would make the difficulty of which I speak. Booms like Renwick's would break with the river we have even if the logs didn't go under them. Sometimes there is trouble fastening booms to the shore so they will hold. I have seen Renwick's boom laying out there in high water.

I think the embankment would make the current swifter, because the more of a bend there is the more eddy, and the further out toward the channel the swifter the current. A raft will go faster in the current. The heavier an object is the harder it is inclined to go against the shore in turning a curve, and the more sidewise it will go. The same with a boat; you turn it short, and it will keep slipping toward shore. I get my idea of swiftness of current from rapidity with which raft will go over a certain distance; but I acknowledge a raft will go faster than the current. About opposite island landing, on Moline chain, below starch factory, is the strongest current. I don't think there is much difference between current at Renwick's and Schoemaker's chain. It is swifter in boat-channel than near shore. We put ring bolts in solid rock by drilling hole in it, put in bolt, and then run in melted lead around it. We put in poles, and lay a stick of timber in the earth in front of them to brace them. The tree pulled out was above Gould's, and then we went to a ring-bolt below Shields' and stopped raft. It's no advantage to have snubbing-posts far off from shore; it is a disadvantage with a big line. If posts are away out, you want places near shore to check it. There is no necessity for taking line clear on shore if you take it beyond snubbing works which are on raft.

I don't want raft to hit shore hard until I am ready to land, as
49 it may break a line or swing around and catch too hard to get away; but when ready to land, the quicker I can get it to shore the better. A smooth bank (not abrupt) assists in landing; it is not near the strain on the lines, and the raft jams out. If the bank was perpendicular, it might turn cribs of lumber over on one another. There is no rock bottom on Renwick's place. There may be some rock-shore yet outside of embankment; I saw a little dark ground there the other day. I know of no place on his premises where a ring-bolt could be put in rock outside of embankment; plenty inside. Sometimes hard to make men see posts and ring-bolts.

I have seen bolts and chains painted with sign on them; not much trouble to find them. Plenty of rock for ring-bolts above Renwick's, on bank below the brewery—we sometimes commence snubbing above there. A place below brewery—railroad track is considerable distance from river—plenty of room there for bolts and posts too. Some in there now, and some at furniture factory also. A bank with a slope of forty-five degrees is not a good landing; it will break lumber couplings, &c., worse than where it is more level. They would go up, but not so easy, and some of them are so badly put together that they go all to pieces when you run on to any kind of a shore. I landed once on levee below new bridge; slid up on rocks. Don't know that it was macadamized. I have seen rafts landed on macadamized levee below old bridge; but is too swift, and not safe. I have seen twelve or fourteen strings wide lying at Renwick's; they extended out to end of pier, maybe farther. They never keep them out very far in high water. Can't give average

time in spring when ice goes out; when water rises, or when I commence running. I think there would be trouble in holding even one log against that embankment in high water. They might hold a
50 string, but it would be a sight of trouble; of course they could do most anything if they would.

J. W. RAMBO testified for appellees:

Live at Le Claire; been for several years engaged in running crafts and rafts over rapids as pilot. I have United States license—piloted since 1864. Am tolerably well acquainted with river and shore in front of Renwick's; have landed logs there for twelve years back; Renwick has had a difficult place to land logs. We usually parted a raft above, and put in half at a time; there is a place just above Renwick's where we landed; the upper end rested on shore above Gould's factory, unless they had some in there, when we left them above on the shore. The upper end of boom was above curve of bank, and we usually dropped in one piece down in boom into this bend—nearly half a raft, and the other half we put in above with lower end resting on first half—so that there is width of two half rafts at that point. At bend above Petersen's factory there were three posts; just west of it some trees, and *and* trees at woolen mills—we generally run first line to trees at Petersen's. I never landed without having two lines ready; the second went out at Shields' mill, that line with one at Gould's generally dropped us into boom.

There were ring-bolts, one below Shields' and one below Gould's, and posts below the two that were used a good deal. Down at the boom in the bend were four trees and some posts. I have landed ten strings of heavy logs at Renwick's with one line. The water in this bend was comparatively slack; right at the shore was an eddy; probably up two strings and out two strings it was comparatively slack, which was a good deal of assistance in landing logs. I have landed eight strings at a time there last summer since the embankment was built. It
51 was nice stage of water, six inches higher than now; but we had considerable trouble, and I have not tried to land so many at a time since. I have landed there at all stages of water since the embankment was put there; I think only two log rafts. I think the embankment was put there in the fall and winter, and spring, a year ago. There was no high water last season. The current will be increased considerably by the embankment, and not as much room to hold logs by one-third in boom as before in high water, and more difficult to land than before. Before the embankment there were points of rocks worn smooth that we could check a raft and let it slide along on without hurting it any, and made it easier to land there I think than it will be with the embankment there. That eddy will be cut out in high water, and I think the current will follow the embankment. I think the current passes there in high water at five and a half miles an hour, and I think I have seen it faster.

Ques. State whether or not in your opinion it is practicable to land and hold logs there since the embankment has been made there in high water; if so, state to what extent; give us your opinion fully.

(Appellant objects as incompetent, and asking for opinion of witness upon a supposition contingent; his leading objection overruled; appellant excepts.)

Ans. It would be risky to put many logs in there in high water. I would not undertake to land or to hold many there.

Ques. How would be if the embankment was filled out to this curve—the blue line—to low-water mark?

(Appellant same objection, and because railroad company had no right to fill it out so; same ruling; same exception.)

52 Ans. I think by filling out to there you will still take up room that can now be used in medium stage of water for holding two, three, or four strings of logs, and make it very much worse in high water because of increased current, and want of good shore to land against—that is, a shore that will let a raft slide upon it without damage, which you can't well do on an abrupt bank. It would take a heavy boom to hold logs there in high water with that bank as it is now; no ordinary boom would do it; a top-heavy one might. I don't think you could hold logs there without plenty of lines in addition to boom in high water. I have examined the embankment recently; there are no posts outside the embankment on Renwick's premises; none, I think, below Petersen's; there are some chains, one or two, on Renwick's run from under the embankment, that we used last summer; can't use trees, because they are over the embankment, and can't get to them quick enough.

Cross-examination:

In low water you have more time to get out to posts and trees than in high. In high water you would be nearer top of embankment, but I don't know how near, or I don't know where high water is on that embankment. The embankment is a little above the main shore; I never saw the water as high as the main shore along there; never saw it to the break of the bank. I have seen it above the cottonwood trees, but they are now below break of the bank; we didn't tie any lines down there in high water; they are about Peterson's factory. There would be no difficulty in getting to the two posts up by Peterson's outside of bank in high water. I think they would be covered in very high water. In high water we commence to snub at Petersen's, and if the posts are covered, we have to have something else to tie to; can't get to these trees on account of embankment. I saw two chains below Peterson's; didn't examine for that purpose, but I usually hunt for something

53 tie to. We stopped raft at Peterson's; then I looked below and found chains to drop down in boom and tie to. It is an easy matter to drop down in boom after raft is stopped, if care is taken and line kept in proper shape. I couldn't say that I didn't observe five chains there; I used but two, and they were plenty; chains ought to be higher up in high water. I meant it was very risky to put very many logs there in ordinary high water; we don't have any very high water now. I have put in most of Renwick's logs for last five or six years; don't think I missed over two weeks at any time last year putting them there. We could land half a raft—five or six strings, ninety feet—there in high water. The rocks, worn smooth, and bank I spoke of, we could use to help land at Renwick's at any time except in extreme high water.

Above Gould's is Shield's, then an old dwelling, and then Petersen's, just above which the railroad leaves the river bank. We ran our lines out at Petersen's, but didn't stop until 1,000 feet above the landing. The two posts at Petersen's are three or four feet apart, and we tie to both at once; we tie to them and check raft with the snubbing works pined down on raft. Renwick has not good boom privileges, and is not in the habit of keeping many logs in his boom, but string them along shore; since been towing with boats he can know within a day when he will be out, and has them brought down as he needs them, usually

from La Crosse, but in very low water they have to get in a little ahead; we can't take them in without great difficulty, and we have to go around Schoemaker's chain, and then tow up stream into his boom; but in ordinary water he can keep them just as conveniently at La Crosse as at Stubb's Eddy, and get them as he wants them. I think I have laid there four rafts in length along that shore. Schoemaker's chain is very dry in low water. In 1863 and 1864 they were very dry. Early last fall there was about five inches of water on them.

54 Redirect examination:

Half a raft can't be landed anywhere on the Mississippi in high water with rafter. I said five strings could be stopped at Renwick's in high water, but whether they would stand up in the current after stopped I have never experimented, but I have seen logs go down from stern under boom, and think they would do so here unless well secured. After rafts are stopped and tied, they have to be loosened up in pieces and taken into boom, and then to mill to be sawed.

Ques. State how they could be without any high water there.

(Appellant made same objection; overruled; appellant excepts.)

Ans. At one time before the embankment they had room in there to do that kind of work, but now I think the current is going to follow that around and make a swift current in where they used to cut their logs up to get them into mill. Good-sized logs run two hundred and seventy and two hundred and eighty to the string; smaller ones run over three hundred. The average number of logs they cut a day is two hundred and eighty and three hundred. The number of feet in a string vary. I have seen them with only 30,000 feet, and again I have seen them with 100,000 feet, but such logs as Renwick has used for past six years would average about 60,000 feet to the string—that is, 60,000 feet on their slide—that is, they scale that. I never heard of 60,000 feet of lumber in a string. If single logs were cut loose there in high water I think they would be lost—they used to cut a string a day, or raft every two weeks.

Recross-examination:

We had extreme high water in 1867 and 1871, and in 1874
55 nearly as high as in 1867. We have had four years of very high water since I have been piloting since 1864. Several years it has been nearly up to those marks. Last year we had what is called now high water for six or eight weeks early in spring; that was before we got the logs. In July last year that was barely enough water to float a raft over the rapids in channel with boats, and one or two didn't come down, and in August it was very low and dangerous for big boats to cross the rapids. In June we had a fair stage of water all the month.

WM. RENWICK testified for appellees, as follows:

I am one of the plaintiffs. The premises consist of a mill and about 1,300 feet of river front; one part of property near western line runs back 900 feet.

(Appellant objects to witness describing property north of Front street. This property is divided by Front street, and is entirely separate and distinct and in no way touched by the railway, and has no connection with it. Overruled; appellant excepts.)

This line runs back 900 feet from our boundary line at low-water mark from which we purchased——

(Appellant objects to his giving contents of his deed and move to strike it out. Overruled; appellant excepts.)

From northwest corner line runs due east 325 feet; from thence line runs due south to south line of old Le Claire road or Front street—when the purchase was made it was not in the city—along the line of this road in an easterly direction, a little north of east, 780 to 800 feet, to east line of Le Claire's reservation, and from the street to the river at low-water mark; then in a southwesterly direction about 1,300 feet; from thence north about 175 feet to the road. This 175 feet from low-
56 water mark to road is a subsequent purchase and causes the land to vary from the square for the purpose of gaining this river front. I have not my deed with me.

(Appellant objects, and moves to strike out all the description, because it is giving the contents of his deeds of purchase, which is not the best evidence of his boundary line. Overruled; appellant excepts.)

Ques. Describe what buildings and improvements there are on these premises, and the use they are applied to.

(Appellant, same objection to proving anything that is on property north of Front street. Overruled; appellant excepts.)

Ans. I would like to correct a part of my description. There is one lot not bounded by the river bank; that I sold out of upper part 40x100 feet, three, four, or five years ago; it is marked E, south of Front street, and comes within twelve feet of high-water mark; on west line south of road we have store-house, nearly two-thirds of it on my ground, put too far west by mistake, next the saw-mill; main building 52x115 feet, with boiler-house 24x32; above that, 150 feet from mill, are five small dwelling-houses, eight feet apart, and a little above that, on the other side of the creek, three dwelling-houses; still above that a store-house for ropes, chains, and other materials for use about mill. These all on south side of road. On north side of road, on west, we have an office, and north of office a planing mill, and 100 feet northeast of office is a shed or store-house for mouldings, sash, and doors; close to street, 400 feet from office, is a dwelling-house, corner of Front and Davis street, facing front; it is not there now. These dwelling-houses are used by my teamsters with their families. The mill was built in 1854, and has been rebuilt and remodelled several times—the last time in 1875. It was built twenty-five feet north of break of bank.

57 There has been done a good deal of excavating to protect from ice, and make log harbor; we found it difficult to hold logs in high water; that is, it was not as good a place as most mills had; we quarried out all the rock we could, and all we required to build bulk-head and foundation for mill; we quarried in front of mill, and deepened it along shore, and in high water the earth washed away as we quarried, and the bank kept receding year after year. The land projected further in at point where mill is built than further above, forming an eddy in water, which we found necessary in order to hold logs, the water being too swift in current, especially in high water. Down to low water was a projection in the river, covered in ordinary water, but dry in low water. We carried that out by raising it, and finally working it above high water, which tended to increase the ease with which we could hold our logs loose so as to draw them into the mill.

This projection was of rock, not stone, two large boulders, I recollect, which people used to step on to fish. The logs are landed above; the rafts come down larger than we can handle, consequently we are in the habit of splitting the large rafts in two, and drop them down and put them in this eddy; sometimes very near mill, the first piece entirely

within eddy, in ordinary water, and second piece lapped over first, and a boom was run on outside during summer months and taken in in winter. The boom was fastened there in order that when we cut logs loose from raft to run down into mill to a slide where they could be drawn in, to prevent them from floating out into the river. In high water the tendency of the current is to come around and run out towards center of river, making a whirl, and this boom was to protect the logs cut loose in it from floating away. Nobody uses a boom for tieing a raft up to; you might if it was still, but it would be useless to stop a raft. We have excavated from the mill along our line at various times every year
58 for twelve or fourteen years; we make some improvement that would assist us in our business, and up to time railroad bank was built had it arranged so we could get along conveniently indeed, and could hold what logs were necessary for our business. Prior to embankment we could hold with perfect safety one and a half rafts, and have held as much as two and a half rafts, but it was not considered very safe; had to take some chances, and go to a good deal of extra expense and trouble to get ropes to hold them; I have had at one time nearly two million feet of logs strung along up the bank from above Shield's factory down to mill. For fastening and landing logs we used trees along the bank where convenient, and at other points put in ring-bolts wherever there was solid rock, by drilling down eighteen to twenty-four inches, and put a bolt of iron with an eye on it and a ring attached to it two to two and a half inches in diameter, and then filled the hole with lead generally, but sometimes where the rock was perfectly solid we split the end of the bolt, and put a wedge in it so that when it struck the bottom the wedge entered and spread out so as to hold the rock. The iron ring was welded in the eye of the bolt, and to these we could tie lines. We did that where we had any facilities for snubbing from the shore. Wherever we could we put in snubbing posts—logs twelve to eighteen inches in diameter, eight to ten feet long—sank down and fastened below with timbers about two sixths of a foot apart, so they would support one another. The posts were far more convenient, because we could snub them from the shore if the lines at the boat should part or any accident happen; we always had a chance to run our line from the shore, and they tied to the raft, and we play out from the shore, and thereby stop raft. We had a number of these snubbing posts along the shore from above Petersen's factory. The sawing capacity of our mill is about 64,000 feet of lumber a day. We have sawed over 100,000 feet, but we had large logs, and the men trying to see how much they
59 could saw. The number of logs may go from 270 to 350 a day, according to size. I employed on an average 109 hands—men and boys.

Ques. State, if you please, the capacity of your planing-mill.

(Appellant objects, because planing-mill is north of road, and entirely detached from property under consideration; not upon the same lots, and is not a part of the business of a saw-mill connected with the Mississippi River; objection overruled; appellant excepts.)

Ans. It would plane about 30,000 feet of lumber a day—20,000 feet of flooring, and perhaps 18,000 feet of surfacing, planing on one side. Then it has a re-sawing machine, and a machine for dressing and heading pickets, and for making mouldings. The re-sawing machine is for the purpose of re-sawing what comes through the mill in large pieces; for instance, we saw plank twelve inches, and pile them, and afterward re-saw them four or six, or any other width our trade might require; and for re-splitting such lumber into siding; a great deal of our lumber is

re-sawed that way. We also have saws for cutting cross, and making pieces shorter, or splitting them lengthwise, or any other way required; we do that as a part of our planing-mill business. We have steam pipes under road, connecting saw-mill with planing-mill, so as to run latter with engine and boilers of former, and have done it sometimes, and have run mill with steam from planing-mill. A large portion of lumber, as it is sawed, goes out in street, and is taken on wagons across the street and piled; some is piled on the river bank above the mill, and some on bank below.

Ques. State what number of feet your grounds there will ordinarily hold as a lumber-yard?

(Appellant objects to all that part north of Front street for same reasons as above; objection overruled; appellant excepts.)

60 Ans. About 7,000,000; by piling it higher, could put 8,000,000 or 9,000,000 without much inconvenience; we have had on it six and one-half millions, I think; the principal yard for storing lumber is on north side of road; only in past few years we have piled lumber in any quantities on other side; north side we have used to store lumber since mill was built, in 1854.

Ques. State what proportion of it there is ordinarily occupied with lumber?

(Same objection; same ruling; exception.)

Ans. North of road been always pretty well filled; balance we put some on, and filled it when scarce of room; on river bank we piled near extent of our ground, on extreme end of river-lot; northeast end of river-lot we use for piling wood sometimes—the lumber on river bank; waste cuttings, slabs, etc., are cut up and hauled of' onto another lot—what is not sold out of box; we use about thirty cords of wood a day, but we sell a great deal right from the box. At time of condemnation we piled a good deal on the lot on the east side of the mill, upon upper part, and for some years on upper corner. To get logs from river to mill, we had a log-way of plank running down from mill to water, at an angle of thirty degrees, and a bull-chain that hooks on to two or three logs at a time, by dogs hooked into these logs, and hauled by steam into mill; distance from mill where logs are received to water varies with stage of water, from 100 feet to less in high water; in low water it might run out 120 feet—I can't say exactly. Log-way has been sunk some; on looking at map, would say 75 to 100 feet would be more accurate.

The binders carried up from log-way here next the water—we have a platform by log-way for a man to stand on to take them as they are cut loose and float down, and they are piled up on the bank of
61 the wharf on west side of log-way. There are sixty binders to a string of logs. They are of hard wood, used and sold for fire-wood. They are saplings bound across the logs with lock down—hickory withes, split and sunk into two holes bored into the logs, and wedged so as to make a strong fastening. The oars are taken on shore. Before the embankment we pulled them on shore until we were ready to haul them up into the yard. We sell them for posts and long poles, or whatever required for. Since embankment, had no way of getting them out hardly. We have had great difficulty to manage the binders; in fact I hardly know how they are got out now—I have not paid attention.

By the railroad company taking land between high and low water mark, our access to the river is cut off entirely, unless we go over the railroad embankment, or through culvert left in bank two hundred feet

above mill, built at our own expense, and timber bulk-heads on two sides to leave hole to draw logs through embankment; instead of dirt embankment, built timber on each side, and put plank one over another, and put in braces across that for probably thirty feet above; and twenty feet below this opening, where we built it up and fastened it in, for, if they had thrown dirt there, it would have filled up our pond close to log-way, so we could not float logs there at all. If the line of condemnation should be used, we could not get log to mill in any event, as we understand they have a right to do. The floor of the mill where logs are taken in is built at a h'ight where compelled to have it, in order to work machinery below; to raise or lower it would compel an alteration of whole machinery of lower part of mill, and some in upper part; don't know the width of the railroad embankment. The line of condemnation strikes
the mill about ten feet from southeast corner, and comes around
62 the corner of the mill in a western direction; hole left to haul
logs through; if moved towards mill, would not have room or headway enough; just have room to get through now. The river is eighty feet from the mill, and all between that and mill condemned. The line they seek to condemn is from mill ten feet north of southwest corner of mill to south line of that bank is eighty feet. I find Murray's figures on map make it seventy-two feet; to low-water mark it is much further. In low water we can get logs in now without much trouble, but can't do it in high water; couldn't hold them. If bank carried out to low water, could not get logs to the mill at all. In extreme low water, might do it by running out further into river with boom; but with fair stage of water, when we can run over rapids, we could not get any logs there. With embankment as it is, could not land or hold logs in high water; at medium stage might hold a few, but would require a great amount of tieing and expense; I mean to hold them above mill opposite where our log harbor was before the embankment.

Embankment fills up our eddy or log harbor. If embankment was carried out to low-water mark, all log harbor would be taken up; the current would sweep along there as it does in the channel, and there would be no possibility of holding logs; they would pull under when tied there with a line. Our boom is fastened one log to another with a chain, one end in the timber, and bolts one and a half inches in diameter through the links and through the logs, and upper log is fastened with long chain in a hole drilled in rock at bottom of river; couldn't tie a raft strong enough to hold; weight of current would break them off into single logs, and they go off.

In excavating rock from front of mill and along shore referred
63 to, we piled a great deal of it in blank cribs made to form bulk-
head, and brought large quantities from above and put in also. This sawdust and slabs don't last only until high water, but outside is solid with timber cribs filled with rock and stones. This bank here or original crib was built partly of rocks and partly of slabs or gravel, and has been partly carried away three times with ice since I owned the mill; there was not enough rock and gravel in it; the last time I built I put in a great deal more rock and gravel, and built this timber edge, and then built between that and the bank, throwing in refuse from mill, and that made a good solid embankment, though a good deal of it is sawdust and rotten chips. It has rotted and packed with many years' wear, growing harder and more solid every year.

It is sufficient for railroad to run over same as any other; a good deal of it is filled with rock and dirt, but most of it refuse from the mill; one hundred feet in width of it is taken and occupied by the railroad

company, or, rather, it is condemned. I don't know, of my own knowledge, how many feet of it, but mill uses two-thirds of an acre, I believe. The break of bank as it now is, outside of their line towards river, is eighteen to twenty feet from center of track across from mill. This land we have made is about on level with road clear out to water. About 500 feet above mill, where track was filled in, there is a place where the current is swift; it was muddy bottom, and when embankment was built its weight forced the mud down and out in river so that it brought low-water mark farther out than it was before; weight of bank building it high as it is (I don't know how high; probably twelve or sixteen feet high), crushing down, forcing mud out into river on outside, forming much lower water there than before for considerable distance, as far as ground is soft with mud bottom.

64 There is a creek, and the culvert left is for water from it to run out. At the time and before condemnation proceedings, I believed saw-mill premises worth at least $75,000. They are leased for eight years on a basis of $70,000.

Ques. Is that the lease? (Paper shown witness.)

Ans. Yes.

(See p. 157.)

APPELLEE. We offer the lease in evidence, marked C.

Appellant objects on ground that lease covers a large amount of property—real estate and personal property—on the north side of highway, and not connected with use of saw mill as river property; that lease includes a large number of dwelling houses that are in no way connected with the navigation of the Mississippi, which also includes a large amount of personal property referred to as being contained in some schedule not attached to said lease, the value of which is unknown; and it does not appear what would be a fair rent for said personal property, including horses and wagons, and because plaintiff can only recover damages to leasehold property which is used in connection with said river, and for reason that the question is, what is the fair rental value of said property, and not what Renwick chooses to rent it for to others; objection overruled; appellant excepts.)

Ques. What is the fair rental value of the use of said saw-mill premises to plaintiffs?

(Appellant objects, because the interrogatory includes the rental value of property which is not saw-mill property; overruled; appellant excepts)

Ans. Seven thousand dollars a year irrespective of taxes and insurance, or, with them, eight thousand nine hundred dollars.

65 Ques. Now state value of saw-mill premises after taking right of way for railroad.

(Appellant objects, because it includes a large amount of property not saw-mill property, detached from saw mill and river, separated by roads and streets, and embraces lots not included in property condemned or passed over by railroad company; overruled; appellant excepts).

Ans. Hard to tell, but I would not estimate it over $25,000 to $30,000; don't know that it could be used for anything else than saw-mill; if a person could get lease of it for a considerable length of time, since condemnation, it might be made valuable at $2,500 or $3,000, but I can't think what it could be used for.

Ques. You may now state particularly and in detail, as far as you can, how you arrive at this estimate.

(Appellant objects, because it is incompetent, is cross-examination of

witness, and because it does not indicate what kind of testimony is called for; overruled; appellant excepts).

Ans. My reasons are that property can be rented for amount of interest on amount I stated to be value of property; for instance, if property rents for $900 a year, it is worth $9,000, because that pays ten per cent. on that amount less taxes and expenses. The taking of the property sought to be condemned entirely obstructs the running of the mill; it obstructs landing of logs, and if they could be landed, they could not be held to be cut apart and sawed up; would have to loosen ropes to cut them apart to get them into mill, and that, in strong current, would be fatal to raft; and if the rafts could be held, they could not be held at bottom of schute or log-way to get them into mill: the current destroys the pond in which the logs are held to be hauled into mill, and if they could be held there, could not be gotten to mill, on account of railroad obstruction; the railroad itself effectually bars up the passage. The log harbor we had is filled up, and does away with eddy we landed logs in; this eddy we used as storing place in high water; we landed close to high-water mark in spring; high water is in spring and June, and as water fell left logs on bank; we left them there, and cut others, so that if we were disappointed in summer, for any reason, and couldn't get logs, we had this reserve on bank; can't always count on getting logs as we want them *them;* sometimes boats meet with accidents, and break up rafts, and are sometimes delayed a week, and if we did not have this reserve mill might have to stand idle; and sometimes in low water rafts go around and stay there three or four weeks; this harbor has been filled up, in great measure, by railroad embankment; can't give exact extent to which harbor has been enlarged; it has been widened nearly twenty-five feet; in some places more, and in some not so much; it has been deepened very considerably; a large amount of rock has been quar'ied out; the upper part was quar'ied out in July, thirty years ago, and more or less ever since, until within three or four or five years.

66

Cross-examination:

I did not own property thirty years ago; Hickey quarried there thirty years ago; I am not positive it was not Courtney—he quarried a large space, say thirty feet into bank from river, 30 to 100 feet long, and 4 to 6 deep; but not for me. It was near east end of saw-mill property now in controversy. I am not aware that quarrying was all done in low water; don't recollect back thirty years ago to know stage of water. He could quarry there in moderately low water; no stone there above high-water mark. It lay anywhere from two to six feet above ordinary low water. I have taken no measurements of it. I don't know what has become of Hickey or the stone he quarried. He left a hole where he quarried, but it has filled up with sand; I don't know if he uncovered the rock. I think he quarried clear down to where rock gave out. There was rock above where he stopped as high as where he dug. It was filled up as much as now when I owned the property. Embankment don't quite fill all the hole made by Hickey—don't go quite far enough north to do so. It is up next to house where Winkless lives, which is next house to Gould's line. I own up to this house and south of it to river. I sold the land to Dunkhurst and reserved ten to twelve feet north of high-water mark.

67

I did some more quarrying below there at the little creek that runs down from Oneida avenue. It was north of Hickey's; the rock ran out west of that, above low-water mark, up say three or four feet, and five or six

feet into bank. I can't tell how large a place. It was shaley stone, and not fit for building; there was not much earth over it, and what there was washed away in high water. We put a good deal of material taken out in wharf or bulkhead below.

We commenced the wharf, or first embankment, about low-water mark, where we put in most of it. Can't state how many yards took out. I built a pier out there and put some of the rock in that. It is now covered by bark, &c., thrown over it; it was a little beyond low-water mark. It was not further in than present one. There was and is a crib beyond that, but not shown on map. Nobody quarried there except myself. I quarried also below that from there 250 to 300 feet above mill clear through to mill, and from in water at low water clear out into bank—75, 80, 100, 120 and up to 200 feet, right at mill—250 to 300 feet long, and from 75 to 80 feet low-water mark north. We
68 quarried mostly with crow bars, picks and drills, and blasted some. It commences at nothing and runs back to two feet at other end. The brook is at upper end; we quarried in that, too. Don't remember that Courtney quarried there for Dr. Barrows. Didn't quarry in holes; only took off top north line of slope of railroad bank; don't touch break of bank at creek, but does all below; it leaves break of bank short distance before coming to creek. Built foundation to mill with part of the stone; it is six feet deep, and two walls 70 and two 45 feet, and boiler house 14 feet high, with very little foundation—two walls 30x14 feet, and back wall 20x14, and inside foundation for machinery 12 feet deep—covering an area of probably 500 square feet; walls two and a half feet thick.

I think we got all stone for that here. Have no harbor there now; railroad bank filled it all up, except we can use very little of it in very low water; no change since last fall. We took away too much rock in front of mill, and ice struck it, so we had to put back fifty or sixty perch to protect it; filled, say, place twenty feet long at southeast corner of mill; we bought that rock. Railroad bank would protect mill from ice now. Quarrying extended from 1854 to 1871 or '72. We did not quarry any north or northeast of southeast corner of mill. Ice crowded up against old bridge and pushed out to either side; since it was removed ice not so bad. All lath and sticks along shore east of mill are droppings from mill; mill run ever since started in 1854, except 1860; deepest place in water is seven or eight feet above mill; east line of bulk head is on line with west line of mill, and runs out at right angles. Logway is probably eight or nine feet from southeast corner of mill; bulkhead runs out in river 115 or 116 feet from center railroad track; main
69 bulkhead not beyond low water, but filling and pier are; pier is built with wood, timbers, and filled in with rock, brick and slabs and between filled with trash and slabs; it don't stop water, but checks it and makes an eddy or pond where we get our logs out; it turns a portion of the water towards end of bulkhead; it intercepts somewhat the natural course of the water. There is sometimes a sedimentary deposit in angle.

We quarried beyond, north of high-water mark, up to ten feet of southeast corner of mill, and all along east of mill. I suppose we cut away twenty to twenty-five feet of bank above what was high-water mark then, along whole distance up as far as creek, which is 250 to 300 feet from mill. I mean deepest places along the north were cut two feet deep, and ran to nothing at low water; we took out all rock, dirt, stones, and other obstructions there so as to make a smooth surface. Didn't quarry much above creek (it's all mud and dirt) until we come to rock

again; the distance we quarried beyond high-water mark was twenty-five to thirty feet along whole 250 to 300 feet, and widened the river to that extent.

Washings from creek run out into river in high water, 100 feet; a good deal accumulates here; we have hauled a good deal out. The accumulation is further out in the stream than we quarried; it has accumulated a good deal since the railroad bank was built; it don't go off in the current, but sinks when force of creek current is spent. Can't see natural original break of bank at creek; what we dug out enabled us in high water to draw our rafts closer into bank. When we built mill had little eddy on log-way, and good one 300 feet above. There was a point right opposite mill covered in high water, two boulders, eighteen to twenty-four inches thick, and we built on this point to hold
70 logs before we had any high water, and built it before we cut any logs; had no water five or six feet high for two years after mill was built; none high enough to float a boat on that point. I don't remember that we had any particular difficulty in holding logs; would have had if water had been much over point.

Got mill running in September or October, 1854; water didn't run over point in very low water; we commenced filling it when building mill. Could not tell how much we filled it first, second, and third years each; fourth year ice carried it out; crib below low water put in in 1865 to assist in holding logs and making harbor. The raft that struck it struck first at Brewery and became unmanageable, and swung round and round, and one end hit pier and broke it. Room in Stubb's Eddy to store 5,000,000 or 6,000,000 feet of logs. Last summer, inside of seven months, twenty-six working days to the month, we sawed 11,500,000 feet; average a day is *day is* 64,000 feet. In 1876 sawed 12,500,000. High water had stopped mill, but not since raised machinery, five years ago, when put in new engine; had no trouble getting logs to mill on account of high water; we don't always have plenty of logs, but have since that, except a day or two at a time. Line of railroad runs ten feet on east side of mill and cuts off access to river by this line here you see on map; we want to get to river there to drive around mill to get poles, bark, etc., that it is necessary to drive through to get logs into mill; we can get wagon there under log way now unless altered since I had anything to do with it. I am not managing the mill.

We can haul our logs through under bank; did it all last summer; there is an opening there left for that purpose; can't give its size; I have been over it recently, but didn't notice whether opening is any larger than log-way. I took witnesses along and showed them ob-
71 structions of railway, and how we had planked up log-way; I think planking comes right up to opening room on one side. I have seen men walking there while working logs. We planked up log-way at our own expense; I was not here, and don't know that our Mr. Shaw did it of his own choice and asked the privilege; as long as opening is left our passage to mill is not obstructed by railroad.

Ques. If railroad company has contracted with city to build in on levee so as not to interpose any unnecessary obstruction to you and to detriment of property owned, then you are not barred from access to your mill, are you?

(Appellees object, because it calls for witness to give a legal opinion on effect of construction of supposed contract, and not any matter of fact; objection sustained; appellant excepts.)

Ans. We have used mill whole season since railroad, and had no trouble; railroad don't occupy all the 100 feet yet, and if they don't ex-

tend bank won't have any trouble of serious character; some trouble and expense, but not to prevent running of mill.

Some logs went under boom last summer; some always do in very high water; that's why we filled up space between pier and bulkhead, and last season when water was highest had to put on more ropes and had trouble to manage our boom; we used to pull it on shore by steam power, and now have to take it to Rock Island to stay all winter, because we have no room, the logs are too long; we have to take them to pieces any way; could not snub with ring; to' small, would cut rope. I think we had ten snubbing posts on our land when the railroad was built; can't use them since; generally had two in a place. If nothing in way we generally run out lines and land raft above Gould's;
72 if we have a good many logs then we run line out above. I have land above Gould's, and landing, and four snubbing posts on it. They are used for snubbing and holding both; I have taken logs down from Stubb's Eddy, but not often. Mr. Shaw put in chains and rings under embankment. There are four or five of them and are to tie rafts to. Embankment obstructs landing rafts at all times, but worst in high water. I don't think water went over 6 20-100 feet last season—don't remember when commenced to saw—don't know if we landed any logs in April or May. Kept none over winter—we had logs all season last year, except perhaps a day or two, and these from failure to arrive.

The $75,000 included saw-mill and appurtenances, planing-mill, office, tenements and land—saw-mill is on tract purchased of Le Claire. This land was purchased in four different tracts. There is a road running through that (indicating) tract—saw-mill is on tract south of road 115x 110 feet near west line.

Second tract is north of first, and connected with it and through it with river—but has no immediate connection. The first deed covered property now on river; next one north, &c. The tract of Jan. '54 is separated from river by 396 feet. Piece in deed of Jan. is north of piece in deed of Aug. 21, and one 28 June, is still north of that, and one of Dec. 21, '55, is extreme west on river. Lessees hold personal property also, but I did not include that in estimate of $75,000—never was offered $75,000 for the property. I was offered $55,000 five or six years ago—have improved it a great deal since that. My lumber yard is just as good to store lumber on taken from any other quarter equally convenient. We have made roads for hauling lumber through the land and improvements of that character—that is, have made it more convenient
73 for piling lumber. We plane wet lumber as well as dry, and it would work as well somewhere else as there.

I can't tell what a mill like mine would cost to build it; the gang in it alone cost $5,000; wouldn't cost that much now; a gang of saws is a heavy frame with wedges and twenty to forty saws, an inch apart, and runs in pillars supported with beams at top of mill and on floor, and bolted down into solid cement masonry, and lower end of gang is supported with pitman, which is fastened to a crank connected with shaft, seven inches in diameter, and thirteen to fourteen feet long, connected with pulleys on line shaft, run by friction from engine, and each saw set in frame same distance, and without variance; then iron rollers placed on frame below saws also run by friction, and logs for gang are placed on these, and rollers above worked by steam to press logs on rollers below; it is simply a number of saws put in a frame to saw a whole log or large quantity at once.

When I said value of use of property was $8,000 or $9,000, I meant to owner, and not to tenant; I want to correct what I said yesterday—

that property was worth now $2,500 to $3,000 a year; upon consideration, I don't think it worth one-third of that, and doubt if it could be rented for taxes, with embankment as it is; I still think the present value of the property $25,000 to $30,000; it would have some value without saw mill—don't know how much; not as valuable as property further east; there has been no sale for property along there for twenty years; I think my saw mill property is appraised by the assessor at $15,000; can't tell how much appraisement is less than marketable value.

I said upper log of boom would sink if fastened to bottom of river in that current, partly by current, weight of boom, and because
74 fastening too short; railroad nor high water ever stopped planing mill; I became interested in property when first bought; deeds were made in name of my father; the property was mortgaged in favor of an eastern man, who sold it under deed of trust, and title came to me that way; my mother owned half until I bought of her in 1873; she got title from sale under deed of trust; it was sold in separate pieces, and I don't remember for how much.

Redirect examination:

These deeds referred to offered in evidence:

One October 14, 1873, consideration $20,000, E Renwick and husband to Wm. Renwick, marked D. (See p. 160.)

Churchill to Wm. Renwick, January, 1872, marked E. (See p. 160.)

L. A. Worth to Wm. Renwick, April 2, '66, marked F. (See p. 160.)

A. Le Claire to James Renwick, Dec. 21, 1855. (See p. 161.)

Same to same, Jan. 3, 1854, marked H. (See p. 161.)

Same to same, Aug. 2, 1854, marked I. (See p. 161.)

Same to same, Jan. 21, 1855, marked J. (See p. 162.)

Ques. State whether or not the premises described in these three deeds (D, E, and F) cover the same premises described in the proceedings to condemn.

(Appellant objects because deeds show for themselves; objection overruled; appellant excepts.)

Ans. These deeds contain a little more than all they condemn.

Ques. State what lands in these deeds not contained in condemnation proceedings.

(Appellant objects, because incompetent and immaterial; objection overruled; appellant excepts.)

75 Ans. The notice I received does not cover west eighty feet, between road and river (witness then proceeds to give contents of notice served on him).

(Appellant moves to exclude this evidence, because it is giving the contents of a description in writing—the contents of a written notice served on him, which is not the best evidence; motion overruled; appellant excepts.)

Schedule referred in lease offered in evidence, marked C1.

(Appellant objects as incompetent; objection sustained.)

Premises leased for eight years, and firm have occupied them three years in April.

Recross examination:

Ques. What consideration did you pay for deed from Mrs. Renwick and husband?

(Appellees object, because immaterial and deed not offered to prove consideration. Objection overruled; appellees except.)

Ans. I gave my mother property valued at $70,000 to $75,000, with

understanding that she should convey me her undivided one-half of the mill property, which I considered at that time worth $25,000. Part of consideration was three stores on Brady street. I paid money at different times; couldn't tell how much. I kept no particular account when I gave her money. I considered the three stores worth $25,000. Then I gave her some houses and lots on Ripley and Fourth streets, but the deed to them was previous to her deed to me, and it don't state that it is part of consideration for mill. Paid no money consideration except as above. The consideration paid Worth in 1866 was merely nominal. I paid Churchill $10,000. I stated notice served on me didn't include that eighty feet.

This map attached to petition does include it. The description says from certain stations to stations marked on map, and map is
76 on petition, and these stations designated go to my west line; but these stations are not marked on the land. Your description seems to be taken from the first deed of Le Claire, and it only runs within eighty feet of my west line, and after describing that you say for remaining 278 feet that there is not that much remaining, it lacks eighty feet of it. You start at D. Gould's line and say fronting 1,028 feet, and then 278 feet, describing from station to station, with boundaries from said first deed, but in the description you give there is not that much by eighty feet.

Certified copy of deed from Wm. Renwick to J. W. Dunkhorst, date August, 1872, offered in evidence, marked K (see p. 162), and certified copy map Churchill's addition, referred to in deed of block 1, marked L (see p. 157).

The description commences at a point south of line of Front street, 116½ feet westerly from northeast block 1, Churchill's addition (which point I can find); thence southerly parallel to east line lot 17 in block 1, 117 feet; thence westerly parallel with south line Front street, 42 feet; thence northwesterly and parallel with said east line of said lot, 117 feet to north line of said Front street; northeasterly along south line of said Front street, 42 feet, to place of beginning; describes lot 17, where I reserved 10 or 12 feet above high-water mark; I conveyed 117 feet, and it included the house.

D. A. McDONALD testified for appellees as follows, to wit:

Live at La Crosse. Been at steamboat business, especially in transportation of logs, twenty years; am acquainted with Renwick's mill and river in front thereof, and have been running and landing logs
77 there about ten years; I always deemed it pretty hard landing. There were rocky points, making strong but narrow eddies. We commence to land immediately by Stubb's eddy, and catch the eddies that lay under points to check headway, and use points to crowd logs on them. Before embankment they never put in, or I never saw in log harbor over three rafts, or twenty-one strings, at a time. I have not landed there since embankment was built. I think difficulties increased by the railroad bank.

Ques. What, in your opinion, is the effect of building a railroad embankment there for landing logs, and as a log harbor?

(Appellant objects; it is asking for an opinion and not facts, is incompetent and immaterial; overruled; appellant excepts.)

Ans. In my opinion, during high water, it is no longer a log harbor; no longer safe.

Ques. How is it at high water?

(Same objection, and witness has not seen it in high water; same ruling; exception.)

Ans. I would think if landing a raft myself in high water, it would be almost impossible to hold it.

Ques. If embankment carried out to line low-water mark as indicated by blue line here, what would be the effect on harbor for landing and holding logs?

(Appellant objects, because it proposes to prove contingent damages, is immaterial and incompetent; overruled; appellant excepts.)

Ans. It would unquestionably make it worse the further out you go.

78 Cross-examination:

I can hardly be called a pilot; I have no license, but have been at work several years. I have landed there in high water, before railroad bank was built; don't know whether before bulk-head; has always been difficulty in high water; had to use extraordinary precaution, and take advantage of eddys and rocky points, and have check works from shore. It is swifter here than some places on rapids; I don't know how swift water is here; I don't think we could land here in extreme high water now, because have not those little eddys under rocky points. I know embankment cuts them off; I know above end of lumber yard is where we held raft under first rocky point; I can't tell anything about it on map.

We begin just below Price & Hornby's mill and rub and rub; don't want rocky points when we get into Renwick's harbor. Any projection will make an eddy, and if you put out an obstruction there far enough it will make an eddy; I have known harbors to be made that way. If railroad bank is above these rocky points, I am mistaken; didn't break rafts, because we fixed for it with lines, &c. I have landed rafts there without boat, and can do it again under same circumstances with same aid from rocky points and those check lines; post might be put in embankment and made as fast there as anywhere; ring is just as good as a post to tie to, but not to check from. There is always some difficulty there in low water; it ain't deep enough; I don't know if bulk-head was extended forty feet out it would help landing any; our difficulty is at upper end. I won't swear that current is increased by railroad bank above where it comes in; I don't know that current is affected by it at all. The swiftness of current is only difficulty there; cur-

79 rent not affected by railroad bank above Renwick's; I think last point was about head of boom and made a pocket into which we could lay about two and a half rafts. I think the railroad is occupying a good portion of this ground; not over three or four logs go up on to points; rubbing of one log would tend to check raft.

J. S. KEATOR testified for appellees, as follows:

Live at Moline; run two saw mills, one in Rock Island and one in Moline; been at this business thirty years. Am acquainted with saw mill of Renwick, Shaw & Crossett—have known it twenty years; am acquainted with their log harbor. Am acquainted with market value of saw-mill property.

Ques. Do your know fair market value of this property before railroad was built in front of it, on river bank?

(Appellant objects; it is immaterial and incompetent. The question in issue is the rental value of use to tenants; objection overruled; appellant excepts.)

Ans. I should say $75,000; I should say value of use to tenants was $9,000 a year including taxes and insurance; difficult to tell what it is worth since railroad was built; if there is no harbor to land and hold logs, I should say not over $1,500 a year, but it is a matter of conjecture. Railroad bank affects harbor materially; before there was a point in river that made an eddy that would hold two lengths of a raft, where now there is no eddy and can't hold logs there in high water.

Cross-examination:

I have not seen any high water there since embankment was built. I was there eight or ten times last season, and never saw any interruption of business. Where they can get logs there is no reason why mill can't cut logs in such stage of water as last year; I landed one raft last year for them with my boat—fourteen strings delivered in two pieces—in medium stage of water. You can hold as many as your boat has strength to hold, and you have lines to hold. If there was an eddy there would be no trouble to land; if there is no high water to affect use of property, it would be worth as much as before. I have seen three rafts there, one above the other, of seven strings each; I dont know how far embankment comes out from high-water mark. Don't know how far out crib extends into river. I think this 337 would not reach out beyond it. Road runs right along on dry land where they used to land logs in high-water, and let them lay on slope of bank; logs can lay right up to high-water mark on railroad bank, if you have same amount of slope.

I don't know what would be measurement, but think if you take high and low water line you could lay width of one and one-half rafts there; can't do it if it is only eighty to one hundred feet; commenced snubbing up at Stubb's eddy, and check all the way down by Severn's and Shields'; could put posts and rings all along there. I think railroad bank too soft to hold snubbing post; I suppose one and one-fourth way down bank would do it. My recollection is rocky points all just above Renwick's mill and where they layed logs, was nice eddy; not much eddy there now.

Don't know how high water was last year; none very high—no trouble to land and saw logs there last year. Can't judge of value of property to tenant by what rent he pays for it. If tenant don't make more than he pays of course he looses, and its value to tenant is problematical. Some years make a good deal out of saw-mill property, and some none; not much for past few years. If no very high water during tenant's lease, no detriment; when water is too high to hold logs there, could harbor elsewhere and drop raft down as it was needed.

When there will be high water is entirely problematical. Don't know how much Stubb's eddy will hold; I think it is all occupied by Lindsay & Phelps and Hornby & Cable. Don't know how far Hornby & Cable extend up, but not above Lindsay & Phelps'. Don't know how far up L. & P. extend. I didn't know Renwick ever used it. I have seen rafts landed above both of them; plenty of room all up there for two widths of raft. Renwick could land above and bring them down as he needed them; I have done that. There is a good harbor at the mouth of Duck Creek, too.

J. P. PHELPS testified for appellees, as follows:

Live in Davenport, and am engaged in manufacturing and selling lumber in East Davenport, about half a mile above appellees. I know something of their saw mill and shore in front of it. Prior to the em-

bankment they had not good harbor, but with chains and posts made it comparatively safe; 400 or 500 feet above mill was an eddy, about 80 feet wide in high water—not so wide in low. The embankment, I think, occupies 60 or 70 feet of that.

Ques. How would it be if carried out to line of low-water mark?

(Appellant objects; seeks to prove contingent and consequential damages; overruled; appellant excepts.)

Ans. I think there would be no eddy. I should say fair market value of use of premises per year, before railroad was built, was $7,000, besides taxes and insurance, and I think railroad makes more than $2,500 or $3,000 difference.

Ques. Now, if embankment carried out to line of low water mark, what would be the value of site?

82 (Appellant objects—incompetent—and seeks to prove contingent and consequential damages; overruled; appellant excepts.)

Ans. I think it would ruin harbor in high water.

Ques. Does high water extend over whole season? If not, state how value of use is effected in low water by injury to harbor in high water.

(Appellant objects—incompetent—and seeks to prove contingent and consequential, and remote damages; overruled; appellant excepts.)

Ans. High water never all season; extreme high water may not be over three or four weeks, and sometimes there is what is called high water two months in a season; without embankment, might put five or six string of logs there in extreme high water, that would keep them from getting out all summer, and then put others outside of them in low water; they would be safer for being aground when low water comes. Without sufficient and comparatively safe harbor for logs, premises almost valueless for saw mill.

Cross-examination:

I have seen Schricker's log harbor; he has a comparatively safe one, except from winds. I mean by harbor slack water, and anything that will make slack water will make a log harbor. Pier built on river don't make as much eddy below as above; can't tell what effect Renwick's pier has on his eddy; not much, I think; natural curve in bank will make eddy; think I have seen ten strings lying outside main pocket at Renwick's. The eddy at Renwick's which I said was 80 feet wide was 250 to 300 feet long—length of half a raft, 80 feet is five strings wide—so this eddy would hold five strings wide by one-half a string long, and logs are 35,000 to 100,000 feet to the string, or an average of 60,000 feet.

83 When low, water follows channel, and when high it goes across Schumaker's chain, and keeps to the bank all way down, and when high enough to run over it that way, I don't think surface of water is affected much by obstruction of the chain; I never examined it and never studied hydraulics; I don't think it as swift there, however, as in channel. I know appellees landed and sawed logs all last season; they are inconvenienced by embankment being in way and in conducting snubbing at landing; that can be remedied, but I don't know at what expense. Then posts not quite so good inside as out; bank most too steep to handle logs; in low water not so much difference, but must have something to tie to. I don't know how many rings or chains there; I saw two. I think curve of railroad bank less than that of eddy; there are two places, I think, north of embankment where curves not filled up by bank; one about thirty and the other twenty feet wide where they used to run logs; I don't say they can't get logs in there high water; had no real high water last year; couldn't

get logs there the highest we had; I should call eight or nine feet higher than now, real high water; don't know what ordinary rise and fall is here; I think ten or twelve feet. I think logs could be landed there with water ten feet higher than now; could be landed at any time. I think it would be almost impossible to land and hold them there with water ten feet higher than now; it could be done; I have seen them there in ordinary high water.

Since testifying that pocket was 250 to 300 feet long, I have stepped it off and find it to be about 500 feet from near culvert above mill up, and about length of a raft. I think it would cost about $30,000 to build such a mill now. I think difference in value of property is owing to inconvenience and risk of holding logs, which only happens in high water; I keep no record of stage of water; one is kept on bridge, and that's better evidence than my memory. I based value of use of
84 mill on what it will earn; it requires large amount of capital besides mill property to earn that; I included piling, handling, drying, and getting ready for market, that takes capital as well. I think $1.62½ per M is cost of manufacture.

Ques. Is not cost of logs five to ten times cost of manufacture?

(Appellees object as immaterial: overruled; appellees except.)

Ans. I have known cases as much as that, and some as low as $4.

Since lease was made in '75 price of logs varied with quality, &c., from $7 to $14; to make this mill worth $7,000, taxes and insurance, it requires a larger amount of capital than cost of mill to carry on the business.

L. S. DAVIES testified for appellees:

Live in Davenport; run saw mill; been connected with it fourteen years, and run it six. Been acquainted with saw-mill premises of Renwick, Shaw & Crossett twenty years; know value saw-mill property; value of use per year of premises before railroad bank was built, about $7,000 and taxes and insurance; and since embankment $2,000 to $2,500 a year less.

Ques. Would there be any difference in value of use if railroad bank carried out to line of low-water mark beyond where it is now; and if so, what is the difference?

(Appellant objects incompetent, and seeking to prove contingent, consequential, and remote damages; objection overruled; appellant excepts.)

85 Ans. I think it would prevent its being used for saw mill purposes.

Cross-examination:

I think such a mill as theirs could be built for $40,000 to $45,000; don't know cost of making lumber there. I include in the $7,000 all the property connected with the mill for piling, &c. I never saw logs landed there; my estimate of loss is mere conjecture.

If every season like last, I know of no reason why it can't be operated all the time. I have known logs to escape landing there—we have gotten some of them—we have also gotten scattering logs that escaped from their boom; not an uncommon occurrence for logs to miss landing at all at these mills above here. I know nothing about landing logs at that mill—and my estimate of damage was from supposed injury of which I knew nothing. Water not very high last year; don't know comparative swiftness there and at Schricker's. I estimated increased danger from risk of landing logs $1,000 to $1,500—an in-

creased expense from fire risk of $500, and ground occupied by bank destroys storage for logs. I think it takes up ground used for storage of five to seven strings of logs in width, sixteen feet to string, which would be 250,000 to 400,000 feet of logs; don't remember figures I put on this item. Logs could be landed here, lay on shore and be used when they could not get more from above. That mill ought to saw that many logs in four to seven days. Then I think there would be considerable expense in keeping snubbing posts along embankment to tie to—that would make no difference if the railroad put and kept them there—that's all the elements of damage I think of. This storage place for logs spoken of was between high and low water mark.

86 My impression is this mill cut more lumber last year than any other mill in Davenport. No difficulty holding and sawing logs there last year—I was on railroad embankment last year.

JOHN M. GOULD testified for appellees:

Reside in Moline; engaged in manufacturing lumber and wooden ware; am somewhat acquainted with the value of saw mills and saw-mill property on our side the river; I have been on premises of appellees.

Ques. I will ask if you know what is a fair market value of the use of said premises per year, as they were before railroad embankment was built in front of them?

(Appellant objects; don't appear that witness has any knowledge of embankment, or whether it injures the property or not, or that he has any knowledge of the value of the use of the mill; overruled; appellant excepts.)

Ans. My judgment for mill and premises would be $8,000 to $10,000; I judge some by cost of them; I have seen embankment.

Ques. State if you know fair market value of use per year, etc., since construction of embankment in front of premises.

(Appellant objects; don't appear that witness has any knowledge of injury caused by embankment, or that he is qualified to give an opinion on such; overruled; appellant excepts.)

Ans. Market value of rent?

APPELLEE. Yes.

Ans. I don t know; I have no knowledge of it.

87 Ques. State what, in your judgment, fair market value would be, after condemnation, not to you or to any particular person, but to all persons who might have a right to use it, or interest in it.

(Appellant objects because witness has said he don't know, and it is merely asking for conjecture, and because the question seeks to avoid asking what law requires as to value of leasehold, and question is incomprehensible to the ordinary mind; overruled and appellant excepts.

There are three or four similar questions in succession, and witness makes same statement to each, but don't answer, and question and objection are repeated, and above embodies substance of all.)

Ans. I look upon it in two lights; if I was in possession as lessee, I would have one view, and if I am not then another; I am at a loss to answer.

Ques. State what effect upon value of property condemnation between high and low water mark has.

(Appellant objects; overruled, and exception.)

Ans. (Witness says he can't answer, but court tells him he must, and

he says:) If I was lessee of mill, I would not give half—not more than half—what it was before.

Cross-examination:

I know of no difficulties about running mill before embankment; I don't know that it was affected by high water, or that it was bad landing, and I don't know that it is worse now than before; never seen any difference; my judgment is based on observation, which is that I have been up and down, on both sides of river, and think it
88 swifter on this side, and more difficult to handle. I know of no difficulties embankment has interposed; don't know that it is harder to land and hold logs, or get them to mill, or that current is increased; don't know that logs have laid there and been sawed since embankment. I know mill was open last year, and believe logs were there that they cut. I think there used to be a harbor there that would hold four to six strings of logs, sixteen feet wide to string, and 440 to 500 feet long, now taken up by embankment, and now water runs down there comparatively swift, and which was comparatively swift to what it is now; it is on this I base my judgment of depreciation of half value. Water is stronger there than at any other mill on river. The question of fire would be an object also, and drawing logs under railroad, although I have no knowledge that it is any objection, and getting poles and oar-stems off of rafts—this not a large matter; I know this embankment and pier materially protect it; didn't know pier had been extended forty feet since railroad was built; if I knew 600,000 feet of logs could be stored there, it would affect my judgment; I was there yesterday; would not say how many logs could be stored where bank is if it were removed—not enough water to put them there now. I think it would require a great deal of caution in landing and tieing a raft to hold it there now, in present stage of water. Whether mill was as valuable last year as before, even if they landed and boomed logs, and run mill all last year, depends some on expense of protecting logs, and I don't know what that was; railroad is an objection to me, any way. No objection to have logs on shore where there is a current; it is then safer; we do it because it enables us to store more logs, and we can't get them in at all in very low water; I don't say logs can't be held by that embankment; if they can be without increased expense, there is no difference about logs; I have not seen logs in that boom since railroad was built.

89 GEORGE H. FRENCH testified for appellees:

Reside in Davenport; was engaged in saw-mill business in lower part of town nearly fifteen years; been somewhat acquainted with saw mill premises of appellees about twenty years; have examined them and river in front of them before railroad was built.

Ques. I will ask if you examined them with a view of determining what effect laying railroad between high and low water mark in front of them would be? if so, state when and under what circumstances.

(Appellant objects; immaterial and incompetent; overruled; appellant excepts.)

Ans. I examined them at time city council desired St. Paul road should come in on bank of river in 1873 or '74. I was president of the road before embankment; value of use of rental depends on lumber market; some years premises worth $10 to $12,000 rental, and again not one-third of that.

Ques. State fair average value of use of this mill per year before embankment.

(Appellant objects; the inquiry must be directed to the time immediately before location of road there; overruled; appellant excepts.)

Ans. I should say about $8,000 would be fair rental for property. I have been out of the business since '72, and am not so well posted as I was.

Ques. What is fair value of use per year in condition premises would be in after construction of road there?

(Appellant objects; witness has not been in saw-mill business since '72, and has not necessary knowledge upon which to base an opinion; overruled; appellant excepts.)

90 Ans. Don't know that I feel competent to estimate difference in value, as I have not been at mill to look over improvements since embankment was made.

Ques. State as near as you can.

(Appellant objects, because witness has said he is not competent to answer; overruled; appellant excepts.)

Ans. I have not looked property over since railroad was put there. From what I know about construction of road, and from what I have seen in passing there, and what I know of the harbor, I should estimate the damage at 50 cents per M of logs sawed there.

(Appellant moves to strike out this answer as not responsive to question, and not based on any principle that can be given as an estimate to the jury, and incompetent; overruled; appellant excepts.)

Ques. State how use of bank in constructing and operating railway would increase expense 50 cents per M of logs cut there.

(Appellant objects; it is cross-examination of his own witness; is incompetent, and he has already said he had not been there to see; overruled; appellant excepts.)

Ans. Main damage is difficulty of holding logs in river, and of handling them after cut loose from raft, owing to increased current.

Cross-examination:

I have not been there. I know as logs are crowded out in current, difficulty of handling and holding them is increased. I know logs are crowded out, but can't say how much; I know embankment has been placed where logs formerly lay; I don't know that bank is all above low water mark; in that case bank makes no difference in
91 extreme low water. They usually cut their rafts into two or three strings, and let them down one at a time; I think the more Renwick could land and hold on the bank the better for him; there is difficulty in holding logs there in ordinary water. Don't know of but one year when could not bring logs over rapids. Don't know how many logs could be laid above low-water mark, nor above high-water mark. I arrive at damage of fifty cents per M from fact that there is extreme difficulty in handling logs in a stiff current; in it can't sort out logs and saw them as you want, and the bank destroys a little harbor he had to store logs in. I don't know that mill ran all last year. Can't sort the logs lying on shore; no particular trouble to assort them when have still or smooth water in boom. I don't know that they were not assorted there last year. I do swear that embankment would crowd out logs as it is there to-day; I have not seen it. I don't know that the bank is above the water inside of embankment at any place at this time. I don't know if embankment was taken away that logs could be placed where it now is. I have not been there.

I know logs can't be landed in as close to bank as before; would not roll logs up bank, but land what I could in high water, and let them stay on shore as water fell. The embankment makes no difference as to logs landed outside of where it is; don't think I ever saw many logs lying by that mill; can't tell how far out logs can be landed and held with safety; it is insecure place at best; didn't know bulkhead been extended forty feet since railroad was built. Further bulkhead extended, greater security for logs. If railroad put out fifty feet and bulkhead extended forty, the difference would not be space of insecure logs.

92 Current don't increase so fast for first fifty feet as for next, and so on as you go towards center of river; center of river swiftest place and channel about the center of river. Don't know Schumaker's chain—I know there is a chain by Hornby's mill. Bulkhead is supposed to be built above high water and chain is below it, and when water don't flow over it the effect of the two on water is same. Bulkhead forms an eddy above and below, and if you build a bulkhead as dam above mill could make good harbor there; don't know what it would cost. If 60,000 logs can be stored with perfect safety outside of embankment it would not be damage of 50 cts. per M. Don't know how fast current runs there. At time I was looking at premises to see about putting road there, Mr. Shaw, one of appellees, was acting in behalf of city, trying to fix line and force us to put road there.

As to French's evidence, see record, page 111.

Appellees rest their case.

APPELLANT'S EVIDENCE.

Appellant introduced in evidence W. M. SUTTER, who testified as follows:

I live at Le Claire; am licensed pilot, and follow that business; commenced in 1846; am acquainted with Renwick's saw mill since it was built; don't remember when bulkhead was built. Crib outside of low-water mark; at least I never saw it dry out there, and between that and shore, and clean out below low-water mark is filled with plank and stuff.

Ques. Is that pier an obstruction to navigation?

(Appellees object, and because it is immaterial and incompetent; sustained; appellant excepts.)

93 (Appellant then proposes and offers to prove that that pier, etc., running from below low-water mark to shore is an obstruction to the navigation of the river by Goldsmith, Rhodes, D. and A. Le Claire, and other pilots. Appellees object as immaterial; objection sustained; appellant excepts.)

Ans. I have landed rafts there; not in highest, but medium water.

Ques. Can you or can you not land a raft of logs in front of that mill in ordinary high water?

(Appellees object as leading; overruled; appellees except.)

Ans. I think I could. Le Claire is fourteen miles from here, at head, and Renwick's at foot, of rapids. At Le Claire in April, May, and June each, the water raised to ten feet above low-water mark, and in fall after June rise it fell very low, lower than since 1864. I piloted last season. Ordinary high water; I call about six feet above low water ordinary high water, and that is about an average, one year with another. Highest I ever saw river at Le Claire was 13 feet 1 inch, and so low that there was only twenty-two inches in boat channel. Never saw it thirteen feet but once, and ten feet several times. It was higher than an average

last year. I passed there two or three times a week last season and saw logs there every time.

JOHN G. GOLDSMITH testified for appellant:

Live at Le Claire. Used to be river pilot, but have not run in some time; commenced in 1854. Am acquainted with saw-mill premi-
94 ses of appellees; landed one raft there a good while ago. Have been along there since railroad was built. Never landed there in high water. Could land raft in ordinary high water—seven or eight strings probably. I never landed a raft with a boat. I think if raft could be landed there it could be held.

STEPHEN RHODES testified for appellant:

Have lived in Le Claire ten years. Am pilot on Mississippi River from St. Louis to St. Paul and Stillwater; been piloting since 1852. Have piloted rafts and boats, and know all coast along upper river. I know premises of appellees. I have assisted in landing there. Before embankment rafts could be landed there in ordinary high water. Had ordinary high water last year. I think rafts could be held there in high water, say ten or twelve feet, above low water. Have examined space for logs since embankment was put there. I know mill was running last season. High water hardly ever stands over three or four days. I never knew it to last over two or three weeks.

Cross-examination:

When I assisted in landing there I think was four years ago with the McDonald. I never piloted a raft. I always ran to Stubb's Eddy and had pilot get on there. I don't claim to be specially a rapids pilot. I never knew extreme high water but once in a season, but ordinary high water three or four times a season. I assisted Rambo in landing a raft there in high water. I have landed there in more than one season.

JOHN SUITER testified for appellant:

I live in Le Claire. My business has been piloting rafts for
95 thirty-five years. I have been at Renwick's mill; have landed rafts there a number of times, but not since the railroad was built there, and at almost all stages of water, except the highest. I believe a raft can be landed there alongside of embankment in ordinary high water as easy as before, except the posts to fasten lines to. I don't think posts on embankment would hold rafts so close to shore as before. I think it safer to land there with boat than without. Have landed several times without boat; pulled one in two there once landing. Ordinarily high water averages about five feet; didn't notice rise and fall last year; was not on river. It requires a good many lines and well secured, to hold raft in strong current; I think it is harder to hold than to land raft in strong current. Was by Renwick's last season and saw logs landing there.

Cross-examination:

I was farming principally last year. I have not quit piloting, but have not run any this year; did last year.

D. H. AINSWORTH testified for appellant:

Appellant offered in evidence the ordinance of the city council of Davenport, authorizing the railway to be built through the city, dated May 11, 1876, marked N. (See 162.)

By agreement of parties the ordinance is received in evidence, subject to objection as to its competency—that the election referred to in the acceptance of the ordinance was held, and the tax referred to was voted by legal majority.

I reside in Newton, Ia.; am civil engineer, and as such laid out and superintended building Davenport & Northwestern Railway into the city and in front of appellees' premises. I have a plat of it as laid
96 out and built (map produced). It is plat or road as built so far as relative position of road and premises are concerned that I made at the time. There are other lines on it which I have obtained from city engineer's office. It is copy of map annexed to report of appraisers. I got east and west lines of appellees' premises from city engineer; it is correct map of road as laid out and built on the shore in front of appellees' property.

Map offered in evidence, marked M. (See p. 157.) The red line is center line of railway as built. The map shows there where the river-side slope is a little outside of mark designated on Murray's map as low-water line—about one foot and three inches above extreme low water. I got it from gauge kept on bridge. So there is no part of the bank outside, towards center of river, of low-water line nor outside of extreme high water line, except in front of mill, where it is on a saw dust pile, which is of course above where low water would go on the mill; that is, above present low-water line there, and the grade is above high water of course. This bulkhead is a pier built out 120 feet from center line of railway track into the stream and material thrown in between. When road was built water ran between pier and bulkhead, but that has been filled now. The whole road was built between high and low water marks, except as above stated where it runs over saw-dust bank. This filling of saw-dust, &c., is above (higher than) high water, and above and beyond (toward center of river) low-water mark; across it I can't tell where low-water contour should have been. There is a mark of the shore above and below there; from center of track to outside of bulkhead is 122 feet to upper top corner. That opening is the logway, and is fourteen feet wide, and is four and a half feet high on north side of embankment, nearest the mill. It inclines upwards from water to mill, and is of course deeper on the river
97 side of stringers. That next opening is a culvert fourteen feet wide, and was left for purpose of going through embankment from lumber-yard to river, and this next one is culvert for water-way.

This point marked R is Renwick's, and there is one chain or ring there, and four above—three of them on Gould's, and one above that. Between track and river there is one pair of snubbing posts opposite Knostman's, and another opposite Gould's. Don't know how many north of track. There is no difficulty about driving piles through that bank to the bottom of it and to the rock, and no difficulty about making it secure—I think the pile itself would be secure enough for snubbing post, but if not another could be driven in an opposite side of bank and fastened to it, and that would be perfectly safe.

Ques. How much of ground between high and low water mark, where logs could have laid, is there taken up by the embankment and north of it?

(Appellees object; it is calling for opinion of witness about a matter of which he has not shown that he has any knowledge; overruled; appellees except.)

Ans. I made stained lines on map there. The space between dotted line and red lines is nearly uniform, and is slope of bank as built, and

green line is contour for what is supposed to be ordinary high water—at least it is four feet below Murray's extreme high water, and is taken from his map, and where the edge of the shore was supposed to be, and the green line between red line and river would be present shore line, with same elevation of water—that is, four feet below extreme high water. I have not calculated distance between this green line and foot of river slope, but I have it between green lines.

Ques. State whether or not you have examined and platted on
98 map the area which you suppose to be a practicable boom line to hold logs from outside of pier, as it now stands, to outside of where it strikes shore above.

(Appellees object, as immaterial, calling for imaginary line not shown to be a proper line, and witness has not shown himself to have knowledge relative to booms and holding logs to entitle him to testify on that subject; overruled; appellees except.)

Ans. I have placed a line there which I thought would be practicable boom line, and marked it; the line is not straight; there are two buoys for boom, or some object, where I suppose had been boom; I put them on map and got their position. I extended that line from bulkhead by these points, and made an angle between outer end of that and brewery, and then compared its shape with shape of shore. I thought it a practicable boom line.

(Appellees move to strike out last sentence, because it is matter on which witness has not shown himself competent, and not responsive; overruled; appellees except.)

I made computation from this line to green line on outside (next to river) of embankment, which I marked as high water, four feet below extreme high water, and it is 960 feet long by 151 feet wide, or 145,050 square feet—eight strings wide, of 16 feet each, and two strings long, of 480 feet each, or 16 strings, and that would not occupy the whole of 151 feet wide—that is, measuring from log-way up. I think this would be a practical boom line, because this bulkhead projecting into river closes up the lower end, and forces current away from embankment. It might not make dead water, but would make it less rapid. A bulkhead put out at end of this 960 feet would make dead water for some distance down. First rocky point projecting outside of embankment is about Renwick's east line. I don't remember to have covered any below that with embankment. I think we excavated to rock in putting in
99 culvert. It was ordinary low water then. There were little places jutting in where water was a foot deep at center of track. We put on outside of embankment, next to river, riprap and stone.

Ques. What effect did that have on flow of water and current?

(Appellees object, is immaterial; overruled; and appellees except.)

Ans. There would be more friction than if it were water or smooth bank and would slow the water.

(The computation between two green lines on map is 58,240 square feet, equal three strings wide and two long.)

Cross-examination:

I was not at mill in high water. I got high-water line from city engineer. Never landed any logs there or saw any landed. Never been engaged as raftsman or pilot; never had any experience as saw-mill man. I know what a boom is; they are pine floats put together with chains and fastened to piers or cribs into river and floats fastened to piles to designate line of boom. I know nothing of this particular boom. The 151 feet is average distance from green line to boom line; distance

from green line to line low water is 60 feet at greatest and ten feet at least points. Opposite culvert boom-line is 95 feet from low water line, and 100 feet above saw-mill it is 75 feet. On Murray map he got the elevation of the break of bank line. He got the gross descriptions, and I suppose wherever there was no line between the gross descriptions he had a straight line, and wherever there was a break of that line he would take a level, and that had an elevation between these two points; then we knew the distance between these two elevations, assuming it
100 to be straight between these elevations. Taking this data, the line I wanted was 18¼. I had one point above and one below. I measured them, and calculated the distance which ought to give the difference of elevation, and that line is contour traced on his map, and which I have given as high water line, and that's the way I got it. I don't know size of pier in river; it is mostly covered with sawdust. It was not when I built road, but I didn't measure it then.

JOHN E. HENRY testified for appellant.

Have lived in Davenport twenty-one years. I am civil engineer, and have followed it since 1836. I am railroading now as receiver of Davenport & St. Paul, and general manager Davenport & Northwestern Railway. I know of the ordinance of the city in relation to building this road into town, and it is built in accordance with that ordinance. It is between high and low water mark. The natural break of river is north of any ground occupied by road across sawdust pile. I was here several times in connection with building first bridge over river before I moved here to live.

The ordinance required no openings to be left opposite Renwick's; I required them to be left at request of Shaw for wagon-road under railroad track east of mill; the opening for log-way was as matter of course, and required no request. Shaw asked me how I expected to provide for log-way; I told him we were building the road against time, and time was limited, and I must adopt most rapid way to accomplish it; that I should leave him the opening for log-way, and build bank same as balance of it; he suggested that a riprap on bank west to log-way would be in his way, and asked my permission to put in the structure
101 which he did put in. I told him the only understanding I wanted was that he should not delay my work, and he did it without detaining us. As to culvert, Shaw said he wanted chance to haul oar stems out of river through it, and I told him certainly, and so built it.

Mr. Shaw had my permission to put his chains or snubbing posts just as he chose, right in the embankment. Snubbing posts can be put into that embankment so as to hold anything, and be as solid as in natural earth. Slope of embankment is at an angle of forty-five degrees, and the usual slope dirt takes when dumped.

Ques. How is convenience of landing and holding logs at that bank compared with shore?

(Appellees object, as calling for comparison by witness with some supposed difference, which is the province of the jury; overruled; appellees except).

Ans. Since railroad been built I have never seen any water in the Mississippi river that would have allowed logs to have gone north of the bank—they are held now by original shore by chains through bank.

Ques. What is the difference in landing raft against that bank and original shore?

(Appellees object, as calling for opinion of witness about landing logs,

a subject on which he is not shown to be an expert as competent to testify; overruled, and exception.)

Ans. I am not aware that difficulty is increased. The curve of bank is not as great as curve of original shore immediately above mill, but railroad curve is as strong as anybody wants to run a train over. Riprapping bank retards current of river by roughness of its surface; the bulkhead also slows the water, and makes dead water some
102 distance above it, inside of end of it. A pier built in the water increases the current outside of it by diminishing the space through which it runs, and slows the current inside of it. At the old bridge, current in high water was five miles an hour in the channel; don't know what it was at the mill. The channel is nearer south side of center of river; the swiftest water is always in the channel; don't know the difference between that and at shore. In making these experiments we started in at Stubb's eddy, and current about same thing clear down to bridge.

I have seen rafts landed by hand and boat. I seen no reason why rafts can't be landed by this bank in high water. The mouth of boom is not changed by embankment, and if raft could get in it before it can now. The mouth of boom is about east end of Renwick's, and is indicated by float where it (the end of boom) is fastened; it seems to be anchored there, nearly opposite that point (say 100 feet west of Renwick's east line) is a projection of land outside of embankment that I have never seen covered with water. Murray's high water—his level of twenty-two—is more water than I ever saw in river, except in ice gorges; I don't think it ever rose that high.

Cross-examination:

I have seen this place every few days since commenced to build road, over a year ago. Have seen high water there before that. It would take four feet above present stage to cover that point spoken of. I never piloted or landed a raft, or had any experience holding one.

Redirect examination:

I saw several rafts land there last year without trouble; I never heard from them any complaint, or saw any trouble getting logs to mill; the mill ran all season.

103 HENRY LAMBACH testified for appellant:

I was at one time employed by the city (Davenport) as surveyor. I laid out and platted Churchill's addition when I was city surveyor. I think this is copy of the map. Churchill was with me and we made high-water mark on map from its appearance on the land, which was very distinct; that 100 feet on west side lot 17 is from the street. I think I made the map in 1855 or '56, when in office. I don't now recollect where high-water mark was then; I put it on map, and it shows. That is the line then, and I swear it was correct. High-water mark was then indicated by having been destructive on the shore; at that point street was 100 feet from high-water mark. I don't know whether street has been changed; it was then sixty-six feet wide, was changed to sixty, but is sixty six now again. Don't recollect any house there. I made survey for Fingar, but don't remember which lot it was; he wanted his east and west lines exact, so as to set his house and fence. Don't remember whether his line went to high-water mark. I remember there was a house on it, and it ran nearly to the river.

(Map offered in evidence, marked O., p. 157.)

AINSWORTH recalled:

I put a scale on my map. I have made computation asked for between Murray's low-water line and break of bank, and it is 13 strings, 6½ in width and 2 in length, and the other between boom line and low-water line; I have got it the same. I have made the computations from the boom line in each case. I have calculation between boom line and Murray's low water; between Murray's low water and south green line, and between south green line and break of bank. I put the two
104 together to make low water and break of bank, and it makes thirteen strings, and from boom line to low water it is thirteen strings also. So capacity between boom and break of bank is twenty-six strings. The length of the line is 950 to 1,040 feet. I have calculated length of string 480 feet. I make an average increase of eight feet by running beyond (north) of green line; a rise in water of four feet makes an average horizontal increase of six feet of space on side of bank, and increase between high and extreme high water is four feet. Zero is an arbitrary point taken to make all calculations of high and low water from; to measure all stages. Zero is put lower than the lowest, and the scale is run up higher than the highest water, so as to measure all intermediate stages. In surveying it is always necessary to assume an elevation to work from and to govern the whole, never expect to reach zero, and this is called the datum line. I was in government survey on river where log business was carried on, and had occasion to make a partial survey in Lake St. Croix, at Taylor's Falls between Stillwater and Mississippi River. My duties were to note all obstructions to navigation on river, and many of them were booms which I had to note, so as to locate on map, and in this way I became familiar with booms. In making supposed boom line I took two points which I supposed had been used for that purpose. They are indicated on map.

Cross-examination:

If this boom line is practicable since embankment it was before, and amount occupied by embankment is that much taken out of boom. Booms may be obstructions to navigation, and were in cases stated, by being placed longitudinally across river, and obstructing channel, thus preventing boats from going where they choose. The survey I
105 made was between August and last of November; engaged at about three months. Water was fluctuating, rising and falling.

E. F. HOFFMAN testified for appellant, as follows:

Reside in Davenport. I am assistant United States engineer, under Col. Parker, at the United States engineer's office, on Rock Island, and I am in local charge of the Rock Island rapids improvement; I have in my office a record of rise and fall of water as kept on river here, and I have made a map thereof; they belong to the government, but I can make you a copy. (Map produced.) Here is an exhibit of ten years, and here nine years, and here eight years, etc., of low and high water, of the oscillations or stages of the water during the whole years.

(Appellant offers map in evidence, and witness will furnish certified copy to reporter, marked P. See p. 157.)

Map P is an exhibit of the oscillations of the surface of the water of the river in a series of nine years—1861 to 1868, inclusive; I mean by oscillations the different stages or height of water, and by reference to lines and figures on side of map you can tell height of water for any day in any month, and by following one of these lines across map can get stage of water for each month in the year, and each day, and it shows,

also, how long the water stood at any particular stage; during those nine years the highest of surface of water in river—the mean of the serial of nine years of highest water—is 9.90 feet; the extreme highest water was 16.17 feet in 1870; it has only occurred once in ten years, and I think it will not occur again; highest water in 1877 was 9.90 feet, April 5; in May, 1877, it went down to 4.20; highest in May was 6.20, and highest in June 6; lowest in June, 4.60; lowest in April, five feet, on 17th and 18th. The other map (offered in evidence, marked —)
106 is the mean of the series of ten years; it is same as other, except it is for one year more, and shows the highest two and lowest two; it gives for 1867 and 1869, also, for lowest two, and here is the mean; this map is just same as other, but instead of drawing all these years, he simply took the highest two and lowest two, in order to make it clearer, and leaves out other seven or eight years; it is for 1861-'70; all the years are included in computation, but are not marked on map; the gauge is from extreme low water of 1864; the blue line here represents mean of stage for the ten years, same as pencil line on other map; this map has not oscillations for last year, but I have them on my book. High water sometimes remains three days, as map shows better than I can tell; with compass, can get from map the exact stage of water for each day.

Cross-examination:

In making mean of 9.90 for nine years I made computation every five days; I can do it for every day as it is done there; the water is highest in April and May, as shown by map; it occasionally rises in June, but not often; generally higher in July than June; low in October; it has been high in October twice in ten years; May 5, 1877, it was 9.90; next day dropped 7-10, next 8-10, next 5-10, next 6-10, and that day it was 7.30, and dropped down to 5 on April 18, and then commenced to rise, and on 26th rose to 6 feet, and remained nearly stationary to about May 10, and on 22d was down to 5, and remained to June 4, with little oscillation; the whole of June oscillates between 5 and 6 feet; in July oscillates between 4 and 5 feet, except on 20th it rose to 6, which a heavy rain might have caused; in August very low, from 3.50 to 1.60; it goes down from September 1 to last, when it is .80; from Oct. 1 to 15 it rose to 1.60, and to last of month 3 feet; Nov. 1 it is 3 feet, and oscillates whole of Nov. between 2.50 and 3 feet; in Dec. it oscillates be-
107 tween 3 and 4; it was lower than last year in 1864 and 1871, and in fall of 1873; it averaged lower in 1871 than in 1877; there is difference in height of water here and in Le Claire; this is about four feet higher, because it is more confined here; very little difference between Renwick's and bridge in that respect; I think for any given period of ten years the average would be about the same; it might vary a little in 100, but not in ten; to get the average of high water for ten years spoken of, I added the highest water for each year, and divided it by ten, and for that purpose the highest water of April and May are taken, because then is generally the highest water; it is not the average stage of water for those years, but the average of highest water; it is not computed from every day, but simply from highest stage of water in each year; I can compute from every day, or for any time, by reference to map; the highest water has been 16.80; the average for whole year during the nine years would not be near 9.90, nor for any year; in high water, in our rapids, current is not as swift as in low water on chains, owing to the peculiar formation of rocks; the water is generally swifter in channel than elsewhere.

A. C. FULTON testified for appellant:

Have lived in Davenport thirty-six years; have been acquainted with this river for last forty-six years, and with it here since I came here thirty-six years ago. Since 1831 my business has brought me in connection with the commerce of the river, lumber, and building, and I have taken an interest in keeping a history of river, its action, etc., since '46. I know premises of appellees and have frequently observed shore there since 1842 when I rafted logs from Smith's or Fulton's Island, ten or eleven miles above here, and ran them down here. I first rafted rails for the farms of Mr. Davenport, then timber and wood, and logs
108 to build wharf and bulkheads. On river here I bought first where brewery and Dessaint's mill are, and boated rock from there down into city; and then bought timber land in Illinois, rafted the lumber and run it to Moline and this city; that's the way I became familiar with river. I have landed various small rafts at these premises; I have seen large rafts landed there; have observed premises frequently since railroad was built. I have taken soundings to ascertain difference between extreme low and high water by measurement; it is sixteen feet—it seldom comes up that high; was high in 1870. It is usually earlier than June; ten to eleven feet is about average high water here; it is eight feet now. Rafts have been landed at Renwick's in ordinary high water; it didn't go very high last season. The embankment is some obstruction to landing, but I am sure they can be landed, and it would be harder with large than smaller one. It is not so easy to tie up raft there; the snubbing posts stand up above.

Ques. Do you think that harbor could be made as good as before embankment?

(Appellees object as calling for opinion of witness as to amount of damages, which is duty of jury. It asks for comparison without stating what facts are. Overruled and appellees except.)

Ans. I talked with Mr. Renwick about it, and I drew him up a sketch of how that harbor could be made as good as before, and gave him the figures. I proposed to build a pier above near brewery, about Renwick's lot No. 12, or further down at his No. 4. I would let that pier extend in fifty feet beyond ordinary water, and that would make an eddy below, and further extended more of an eddy; should make it thirteen feet high, and above on raft side; that always makes an eddy below. The base should be 25x30 feet, and taper it up; I have estimated on
109 six-inch stuff, and then plank on north and south with two-inch, and west side without planking, and then fill with rock between that and shore. It would take 9,545 feet of lumber, figured at $17.00; can get common lumber at $10 and $11, and good at $14; $12 worth of spikes, and 416 perches of rock, at 80 cents per perch, makes total cost of pier $509.70. I think that would be total cost of pier, and would make harbor as good as before, and would cover more surface the year around. Severn filled out at his brewery, and has made better eddy there than Renwick has above made by his sawdust pile. Below Renwick's pier is better place to land now than above it; there is better eddy there. I put two temporary piers at point spoken of above, and they staid there four years. They were put in four feet of water. Then I would make his pier at mill thirty-five feet at base, and fifty-six feet long, and eighteen feet high; plank it same as other and fill with rock. On this I figured lumber a little more, and make total cost of it $1,345.56; and then I add the other pier, and it makes $1,942.62. This pier could be extended to advantage.

My experience in building in the Mississippi River has been in water

from 4 to 11 feet. I put in foundation for cotton-press in New Orleans in 11 feet of water; it cost $140,000, and is standing now. I built Burrough's mill in edge of water and filled it with rock, and which I boated from above, and rafted and floated down timbers for the bulkhead. I bought lot below Shields' filled it out, and riprap'ed 10 to 12 feet high and about 45 feet long, and it stands yet; and above that I filled out 70 x 120 feet, and after four years it stands all right; railroad built on it now.

Ques. What, in your opinion, would it cost to make harbor at Renwick's as good as before embankment?

(Appellees object, as it calls for opinion of witness. Overruled; appellees except.)

110 Ans. I am satisfied what I have stated would, if put in, make a better harbor than they ever had the year round, and give as much space for logs, and a much better harbor in high water, because when high water ran over points at brewery, and was no eddy. Before his bulkhead was put in there was no eddy at all there in high water.

(Appellees move to strike out witness' speech as not responsive to question. Overruled and exception.)

The cost of improvements I suggest would not be over $2,200 to $2,500. I have had experience in this kind of business thirty-six years.

Cross-examination:

By this pier I have spoken of Renwick would gain an eddy the width of the pier, with or without railroad embankment, in high water. It is the projection up there that makes his eddy anyway; the eddy might diminish say fifteen to twenty feet towards lower end. I was active in getting road into town, and worked for it, as I did for every other road ever built here; but I have not given my opinion on different routes proposed. I once made an affidavit as to damage a railroad would do running down Front street.

Ques. Did you swear in that affidavit if the railroad run on Front street in front of this mill that there would be comparatively no injury to mill?

(Appellant objects, immaterial and incompetent. Overruled and exception.)

Ans. I don't recollect; I may have said it. I consider there was so injury, but I looked at value of works, and took all things into consideration.

Ques. Did you not state that injury by running on the street
111 would be comparatively small, while to run on river bank, where this road now does, would be serious injury to mill, and cause payment of heavy damages?

(Appellant objects, immaterial and incompetent, and affidavit is best evidence of its contents. Overruled and exception.)

Ans. I said it would be less damage on street, and think so yet; in speaking of the damages, I referred to the fill and work; I can't say that I spoke of the damages. The rafts I ran here from Sears' mill at Moline and Le Claire were mostly sawed lumber, and measured about 28,000 feet. I crossed river at upper end of island and came down on this side; there were eight or ten of them; they were rafted in usual way.

Redirect examination:

I have seen rafts landed about the brewery and from there down, in medium water. I have rafted logs.

JOHN LAMBERT testified for appellant:

Have lived in Davenport township thirty-four years, and my house is about four miles Renwick's mill. My business used to take me in front of this property along river bank more frequently than now. Before mill was built I used to bring vegetables to some families who lived in Crab-Apple grove, just below where mill is. I have examined ground before and since railroad was built. I was one of the commissioners.

(At this stage appellees wish to have the answers of their witness, French, referring to 11,000,000 feet, and the one that damage by railroad is fifty cents a thousand of logs sawed, stricken out, and so moved; to which, at this stage of proceedings, appellant objects. Overruled and ordered stricken out; appellant excepts. See p. 90.)

112 Ques. Tell the jury what was difference in value of this property before and after railroad was built?

(Appellees object, because he has not proven himself competent to give an opinion on the subject. The question asks him to state directly amount of damage to the property, instead of asking value before and after condemnation. Sustained and appellant excepts. Appellant offered to prove by witness that he was shown by Mr. Ainsworth, engineer in charge, where road was to be located, and how built. Appellees object. Sustained, and appellant excepts.)

Ques. State whether or not the engineer of the railroad showed you and other commissioners line of road and the openings which he proposed to leave in it for benefit of property owners?

(Appellees object for same reason. Sustained, and appellant excepts.)

Ques. State whether or not the opening and crossings which were pointed out to the commissioners were put into road when built?

(Same objection; same ruling. Appellant excepts.)

JOHN R. BOYLE testified for appellant:

Lived in this county since 1862. I am acquainted with the property. My business is railroading; contractor. I know where this road is built through property of appellees. I examined it before railroad was built and since. I was one of commissioners.

Ques. What, in your opinion, is the difference in value of this property before railroad was built and since?

113 (Appellees object; witness has not shown himself competent, and for reason assigned to question put to John Lambert; sustained; appellant excepts.)

Ques. What was its value before railroad was built?

(Same objection; overruled and exception.)

Ans. Don't know that I can say in dollars and cents; but I do say that property is better off with road than without.

(Appellees move to strike out latter part of answer; sustained and exception.)

Ques. When you, as one of the commissioners, examined this property with a view of assessing it, was the line pointed out to you?

(Appellees object; sustained and exception.)

Ques. State whether or not manner of building road with openings and crossings for convenience of property owners were pointed out to you.

(Same objection; same ruling and exception.)

Ques. State whether or not road was built with opening for log-way for appellees.

(Same objection; same ruling and exception.)

Ans. I have built 1,200 miles of road; been building them since 1839.

Ques. State whether or not, in your opinion, this road is built in front of appellees' property, with openings and crossings in reasonable and proper manner?

(Appellees object; immaterial, leading, and calling for opinion on a point on which opinions not admissible; sustained and appellant excepts.)

114 HORACE BRADLEY testified for appellant:

I live in East Davenport; have known appellees' premises forty years; I am acquainted with river bank there; I travel by there altogether, and in olden times used to run some small rafts by there. I was one of commissioners. I know very little about steam sawmills; sawed some at mouth of Duck Creek in an early day.

Ques. What, in your opinion, was the value of property before railroad was built?

(Appellees object, for same reason as to similar question to previous witness; sustained and appellant excepts.)

Ques. Can you answer as to value of it?

(Appellees object; overruled; exception.)

Ans. I think it has not been damaged a great deal.

(Appellees move to strike out as irresponsive and incompetent; sustained and exception.)

Ques. Was line of road pointed out to you as commissioner?

(Same objection as before; sustained and exception.)

Ques. State why openings were put there.

(Same objection; same ruling and exceptions. Appellant offers to ask same questions of John M. Eldridge and James Baker, two of commissioners. Same objections; same rulings and exceptions.)

JACOB ELDRIDGE testified for appellant:

Live in Davenport, and have for thirty two years, and own here
115 various lots and houses and lots. I am real estate agent; buying and selling for myself and others; I know Renwick's mill property; I know where railroad is built there and when; the whole property north and south of road was worth about $40,000 before railroad was built; I should think there was very little difference in value since railroad was built, except that now property has gone down a good deal.

Ques. How much difference?

Ans. If going to buy it I would give more for it.

(Appellees move to strike out as not responsive. Sustained, and appellant excepts.)

I could sell it for about same price, since I should say it is worth $40,000 immediately after railroad built.

Cross-examination:

Don't know very much about steam-mill property; suppose his cost about $20,000; don't know what it is rented for.

Ques. If this property was rented for $7,000 year, would you say then your estimate of $40,000 was value of property?

(Appellant objects, as incompetent and assuming something not proven. Overruled and exception.)

Ans. I would say I was about right. I think there were four acres in first purchase, and about 400 feet river front afterwards; don't know

exactly the length of river front; but suppose six or seven hundred feet. There is no saw-mill on the Churchill property; never acted as pilot or raftsman, and know nothing about running logs. I think advantages of the railroad equal the disadvantages—it makes the balance of the property worth more. Then for side-track purposes it is an advantage. I think it worth $3,000 to have it there. I did not
116 go around town with an officer of the company, introducing him to persons, asking them how they would testify, &c. I introduced Barnes to Mr. Sears, but didn't ask such questions. Mr. B. asked him something about it. I didn't notice what it was. I don't know capacity of Renwick's mill; don't know how many men they employ. Mr. Shaw has told me about expenses of it.

CHARLES ELDRIDGE testified for appellant, as follows:

I have lived in Davenport since 1842. I am land agent, buying and selling real estate. I know the Renwick property; part of it is separated from river by Front street. I know railroad there. I know when and how it was built. I think the market value of property about $40,000. In 1857–8 I had occasion to enquire specially into the value of this property; but not since. Property very cheap now, and liable to fluctuation. I think its value about same since railroad was built. I know nothing about river privileges. I know location of property with reference to railroad. I know where the lines are, and railroad is beyond high water-mark, toward river.

Cross-examination:

Don't know what Renwick paid Churchill; may have been $10,000; it was estimated at $3,000 in 1858; some additions made to mill; I don't know how much. I know nothing about building saw mills; not much experience in sales, &c., of saw mills since 1858. I know nothing about rafts or running logs; not a regular pilot, but have assisted in landing logs just this side (below) of Renwick's; water little higher than now; it was about twenty-five years ago. I know nothing about holding logs after landing. I can see no damage to property by railroad. In my estimate I have included no damage to log harbor or for landing
117 or holding logs; I know of none. My estimate was not simply on value of real estate; I arrived at it by what I learned about it in 1858; I don't know that property has doubled since then, and don't think it has. I estimate increased value since 1858 at about $10,000, for improvements, etc. If machinery, etc., would cost to-day $35,000, that would raise my valuation. I estimate the five acres at $8,000; don't know value of the Churchill lots. I never sold any river lots; didn't know river lots held higher than others, and think they are not. I have been over this property recently, helping to survey it—once for railroad company and once for Renwick.

Redirect examination:

I was helping survey as chain man only. I have examined this property frequently; saw it two or three times a month last year; have been on embankment; mill was running part of time; I didn't see that log harbor made any difference about running mill. When I was on embankment, logs were up on dry bank. There appeared to be a boom of logs, and seemed to get them to mill about as usual.

Recross-examination:

I was up there all time railroad was being built, every day; was there every week last summer, sometimes walking out and sometimes on street cars.

J. GOLDSBURY testified for appellant:

Lived in Davenport twenty years past. Am in real estate business, buying, selling, and renting, and gives me an idea of market values. I know property of appellees; have not dealt very much in mill property.

118 I think below road worth $30,000 and above $8,000 or $10,000 before railroad was built. Have seen property since railroad was built, and I think it helps the property. I was there last week and looked at property. I think it worth as much since railroad as before.

Cross-examination:

Have known of no sales of saw-mill property in last five years, except I think this was conveyed; perhaps twice. I estimate value of this land at $15,000 to $20,000; high estimate. I include all covered by lumber yard. I suppose 400 or 500 feet on river; 1,300 feet would make difference in my estimate. Don't know of purchase by Renwick of Churchill. I suppose lots below street worth $8,000 to $10,000, and that above street about as much more. Improvements below street, without machinery, I suppose worth $4,000 to $5,000, and machinery, of which I know very little, $8,000 to $10,000. If machinery and mill alone cost $40,000, it would add $15,000 to $20,000 to my estimate of value. I know nothing about cost of building a saw mill. I know something of cost of building, and don't see how it cost half that much. I built a mill, put in machinery, engine and all, and can judge something of cost from that. Have not been through mill, and don't know capacity of engines; don't know how many saws. I think four boilers.

I went to the mill to meet a friend who wanted me to sell a house; I went through mill and looked out lower end; didn't go out of mill, and was not there much over five minutes. I was not requested by Judge Grant or any one else to make an estimate of the value of the property. I did not tell Abner Davison that I would have to testify for railroad you for him, and then you stopped.—A. Yes, sir; and then Fagan told me about this thing that a "boodle" was in; he told me it was Don-

119 company because Judge Grant had given me a good deal of business. I did not talk with him on the subject. He may have asked me if I was subpœnaed in this case, but he did not ask me what I knew about the case, nor did he ask me what value I put on the property.

Renwick asked me if I had been to see the premises, and if I knew how much it damaged them. He told me something of amount of damage it had done, and how seriously it had affected them, and asked me what I would swear to. I said very little, if anything, to him. He asked me to get up and ride with him up there and see premises. I told him I didn't know by whom I was subpœnaed; that I didn't know a great deal about that kind of property; that both parties were my friends, and I would rather not testify at all.

W. P. CAMPBELL testified for appellant:

Have lived in Davenport thirty-three years past. Appellant offers in evidence certified copy United States patent to Antoine Le Claire, marked Q (see p. 169). I am surveyor and civil engineer. I was deputy county surveyor two years and surveyor twelve. I have run lines of Le Claire's patent. (Patent read.) I have not run course and distance from southwest corner that stone or mound mentioned in patent. I ran it the other way, to wit, at nothwest corner of the reserve; I fixed that point several years ago. There was a burr oak there, also a stone. I ran at one time

from the oak down to river, fifty-seven chains fourteen links. Then on March 19, I ran from the point, taking same basis that Murray ran from river. Murray and I ran the meanderings; my impression is Murray ran a little farther south than corner was originally. The ground has been so excavated that it is difficult to tell. He fixed a point
120 there; then took meanderings in the course south of seventy-three degrees west, reverse bearing five chains forty-five links, and at end of that point distance was thirty-three feet four inches to center of railroad track, continuing on then a new course from that point fifty-three degrees west reverse, and continued until he struck Renwick's mill on east side ninety-seven feet four inches. Then south it was ninety-seven feet four inches to center of railroad track. I didn't know how far it was from bank of river; I suppose it was not far from high-water mark, but bank has been so excavated and filled; can't tell much about it. It is about thirty-one feet four inches to center of railroad from southeast corner of mill post; then continuing on west line of Renwick's property it was eighty-four feet four and a half inches to center of railroad track. Renwick's west line is ninety-seven feet four inches from mill. We commenced survey on 16th and finished on 19th of March, 1878.

Cross-examination:

We didn't run whole line to southwest corner of reserve. There is discrepancy in United States field notes, and don't know whether we would have hit that corner or not by continuing. In running line down river we started at southeast corner of reserve; we took the established corner that stands ten chains seven links south of northeast corner. If we had started at southwest corner, where patent does, and down to southest corner, taking meanderings, and run around, would have closed according to traversed table and meanderings through Renwick's property; would have been within seven links of, if not same as we ran them. If could find southwest corner could take field notes and trace meanderings according to patent. If we start at southwest corner at high-water mark, and run east, I think we would go north of line we did run,
121 because bank has washed away some there. I don't know where it was originally. Original survey made in 1836. Never helped Murray make any other survey there.

Appellant offers in evidence map marked R, and map of Le Claire's addition of eighty acres, marked S. (See p. 157.)

Appellant rests.

Appellees introduced following rebutting testimony:

E. S. CROSSETT testified for appellees, as follows:

Engaged in manufacturing and selling lumber in Davenport. Am one of appellees. I know premises. I have experience of twenty-four years in handling and sorting logs in booms in Wisconsin and here. It would be impossible to hold boom out at end of that pier, and have it of any use to hold logs, because water is so strong logs would go under boom at present stage of water; would have to draw boom in fifty feet, and if water was higher, would have to draw it in more. Ainsworth's practical boom line, as marked, is outside of bulkhead. Can't say exactly where a practicable boom line would hit upper end of our harbor, but in low water we can put six strings opposite that point; not so many in high water, because current is so strong we would not want to put so many.

Cross-examination:

The upper part of Ainsworth's boom line is our present boom; those points are floats where we fastened our boom last year; I can't say where we fixed it running from that float; we fastened lower end of it in fifty feet from end of bulkhead, and sometimes further than that. From that point up is where Ainsworth's line runs, and fifty feet from end of bulkhead to that float is where we run the line;
122 from that float up, Ainsworth's line corresponds with ours; from there down, I should run in fifty feet from end of bulkhead instead of, as he runs it, out to end of bulkhead.

M. O. BARNES testified for appellant, as follows:

I went up to Renwick's mill and embankment with McDonald, from court-house. We went up to Severn's brewery on track from the government bridge.

Ques. State at what point you saw first rock projecting out so as to afford rafts resting place in coming down to Renwick's mill.

(Appellees object, as immaterial and hearsay; overruled, and exception.)

Ans. Right opposite Gould's factory was first rock projecting outside of embankment.

The foregoing was all the testimony introduced on the trial of said cause.

And after argument by counsel, said cause was submitted to the jury under instructions from the court, and afterward said jury returned a verdict of $5,000 against said appellant, and on said verdict a judgment was entered for costs. (See p. 124½.)

That said appellant thereupon, in open court, gave notice of motion to set aside said verdict and for new trial, and thereafter, at the same term of said court, to wit, April 4, 1878, filed said motion, in words following, to wit:

Motion for new trial.

The above named defendant moves the court that the verdict of
123 the jury rendered in this cause be set aside, and for a new trial in this court, of the above entitled cause, upon the following grounds:

1. Said verdict is not sustained by sufficient evidence, and is contrary to the evidence.

2. Said verdict is contrary to the law.

3. The damages awarded to the jury in this cause are excessive.

4. The court erred in excluding evidence offered by said defendant on the trial, and to which ruling defendant then and there duly excepted, as more fully appears by reference to the testimony taken down on the trial by the official reporter.

5. The court erred in admitting evidence offered by the plaintiff on the trial against the objection of defendant, and to which ruling said defendant then and there duly excepted, as more fully appears by reference to the testimony taken down on said trial by the official reporter.

6. The court erred in refusing to give to the jury the instructions asked for by the defendant, and numbered from one to twenty, both inclusive, and also numbered 23, 24, and 26, and which ruling was then and there duly excepted to by defendant.

7. The court erred in giving to the jury against the objection of defendant the instructions asked for by plaintiff, and numbered from one

to four, both inclusive, and which ruling was then and there duly excepted to by defendant.

8. The court erred in giving to the jury against the objection of defendant, the instructions given to the jury by the court on its own motion, and numbered from one to eleven, both inclusive, and which ruling was then and there duly excepted to by defendant.

9. The court erred in excluding evidence offered by defendant
124 tending to prove that the piers, booms, etc., erected by plaintiff along the river bank in front of his said property in dispute were and are obstructions to navigation and nuisances; to which ruling of the court the defendant then and there duly excepted.

10. The court erred in excluding evidence offered by the defendant tending to prove that the railway embankment along in front of said property of plaintiff, erected and used by defendant, was and is built with opening, log-ways, and roads, and with all possible conveniences for the accommodation of the said plaintiffs in operating their said saw-mill, and that said embankment, as constructed, constitutes no material obstruction to or damage to the said boom, etc., of plaintiff; to which ruling defendant then and there duly excepted.

11. The court erred in admitting evidence offered by plaintiff, and against the objection of defendant, tending to prove damages to plaintiff's property by the taking and using of space between high and low water mark on the bank of the Mississippi River in front of plaintiff's property; to which ruling defendant then and there excepted.

GRANT & GRANT, AND
BILLS & BLOCK,
Att'ys for Def't.

Which said motion was overruled by the court; to which ruling said appellant then and there duly excepted.

124½ *Judgment entry.*

And the following judgment entry was made in said cause, to wit:

RENWICK, SHAW & CROSSETT, PLAINTIFFS,
vs.
THE D. & N. W. RY. CO., DEFENDANT.

FRIDAY, *April 19th*, 1878.

And now this cause being an appeal under provision of section 1254 and following of the code, coming on for trial, on this day, to wit, the 30th day of March, 1878, came the parties by their respective attorneys and also a jury of good and lawful men to wit, Henry Klass, James McVey, John D. Evans, Joseph Moore, John Weber, J. P. Mars, Christian Rock, John Pressley, J. McBride, John Hill, J. M. Sexton, Joshua Brown, who being elected, tried and sworn to well and truly try the issue joined, and a true verdict render according to the evidence and the law as given them in charge by the court, did return their verdict fixing the damages of said plaintiffs in this proceeding at the sum of $5,000.

And it was then and there in open court agreed by the respective attorneys for said plaintiffs and said defendant that said defendant would have until the June term of this court to file exceptions to the charge of the court and to file a motion for a new trial, and to present a bill of exceptions, and now such exceptions to the charge of the court having

been also filed, and such motion for a new trial having been also filed, and having been duly considered by the court, it is now ordered and adjudged that said motion for a new trial be, and the same is hereby, overruled, to which said defendant duly excepts, and it is thereupon ordered and adjudged that plaintiff to have and recover of and from said defendant the costs of this suit taxed at $547.50, and that execution do issue therefor to all of which defendant excepts, and it is further ordered and adjudged that said defendant have until the 11th day of June, 1878, to present to Hon. D. W. Ellis, a bill of exceptions in this cause.

Let the foregoing be entered as the judgment in the above entitled cause, dated April 19, '78.

D. W. ELLIS, *Judge.*

That said appellant then and there deposited with the sheriff of Scott County said sum of $5,000, and at same time served upon him (said sheriff) its notice of appeal to this court, which notice was also served upon said appellees and said clerk, dated and served April 22d, 1878.

And said appellant immediately and during said term, to wit, April 3, 1878, filed in said cause, its exceptions to the instructions of said court to said jury, which said exceptions are in full in the record herein,
125 and substantially covered by the bill of exceptions herein contained in full.

And before submitting said cause to said jury, the court, upon its motion and at request of appellees, gave certain written instructions to said jury, to each and every one of which said instructions appellant then and there duly excepted. (See p. 133.)

Said instructions and exceptions are in full in the record in this cause, and also printed substantially in the bill of exceptions hereinafter, and at same term of said court said appellant prepared its bill of exceptions in said cause, which was presented to and duly signed by said court, and is in words following, to wit:

Bill of exceptions.

Be it remembered, that at the March term, 1878, and on the 30th day of March, 1878, this cause coming on for trial before the court and a jury on the issues joined therein, and the plaintiff, to sustain the issues on his part, called as a witness one Edward W. Durant, who being duly sworn as a witness in this cause, was by plaintiffs' counsel interrogated as to his knowledge of the damage done by the location and building of the defendant's railway embankment and track in front of the property of the plaintiffs, described in the petition in this cause; whereupon said defendant objected to such evidence on the ground that the railroad aforesaid at said point is located and built wholly between high and low water mark on the bank of the Mississippi River over a part of the said river bank, which was in its natural condition when said road was located and built; and also because the damages sought to be recovered were consequential, incidental, and contingent; which objection the court then and there overruled, and allowed said witness to give his opinion as to said question of damages, as appears by reference
126 to his evidence, which is made part of this bill; to which ruling the defendant at the time duly excepted.

And be it further remembered, that then and there, and upon the trial of this cause, it was agreed in open court, between the respective counsel for said plaintiffs and said defendants, "that the defendant objects

to all testimony tending to prove a claim for damages on account of the road of the defendant being laid down between high and low water mark upon the bank of the Mississippi River, on the ground that the defendant is entitled to lay down its tracks between high and low water mark without paying damages to the riparian owners." And that all such objections are overruled by the court, and that the defendant excepts to such rulings. And the court then and there approved of such agreement, and ordered the same to be reduced to writing by the official reporter, which was done, as appears by reference to the evidence taken on said trial and made a part of this bill of exceptions. And all the evidence of the plaintiff was given under the above agreement.

And be it further remembered, that upon the trial of this cause the plaintiff, to sustain the issue on his part, interrogated said witness, Edward W. Durant, upon his examination in chief, as to his opinion as to what damages would be caused to said property by an extension of the said railway embankment by defendant fifty feet further into the river than the present embankment is built along in front of said property, and not extending beyond low-water mark; whereupon said defendant objected to said evidence on the ground that such damages are contingent, and may never arise to plaintiffs; and because such embankment could not in any case extend beyond low water mark in said
127 river; which objection the court then and there overruled, and allowed said witness to give his opinion to the jury, that in such case it would not be possible to hold logs there at all; to which ruling the defendant at the time duly excepted.

And be it further remembered, that upon the further trial of this cause, the plaintiff, to sustain the issues on his part, interrogated said witness, Edward W. Durant, upon his examination-in-chief as to his opinion as to whether, if said railway embankment were extended out to low-water mark on said river, and said log-way through the same closed up, it would be practicable to take logs over the embankment of the railroad into the mill. Whereupon defendant objected to said evidence, on the ground that such damages are contingent, and may never arise during plaintiff's lease; which objections the court overruled, and allowed said witness to testify that it would not be practicable to do so in such case. To which ruling, at the time, the defendant duly excepted.

And be it further remembered, that upon the further trial of this cause, the plaintiff, to sustain the issues on his part, interrogated said witness, Edward W. Durant, upon his examination in-chief, as to what kind of a log harbor there would be in front of the property in question, for landing and holding logs, if said railroad embankment were there carried out to the line of low-water mark. Whereupon defendant objected to said evidence, because such damages are contingent, and may never arise during the time of plaintiff's lease, and because it did not appear that witness knew where low-water mark was at that point. Which objection the court overruled, and allowed said witness to testify that in such case, in his opinion, logs would not be secure there. To which ruling, at the time, the defendant duly excepted.

128 And be it further remembered, that upon the further trial of this cause, and on the 22d day of March, 1878, the said defendants asked leave to file an amendment to their petition, and claim to condemn in this cause, and filed a motion for leave to file such amendment; and said proposed amendment was then and there presented to the court, with said motion; which proposed amendment was in words and figures following, to wit:

(Here the clerk will please insert the amendment to petition presented on the said 22d of March, 1878, in this cause. See p. 14.)

Whereupon the court overruled said motion, and refused to allow said amendment to be filed. To which ruling the defendant at the time excepted. (P. 34–14 & 16.)

And be it further remembered, that upon the further trial of this cause, the plaintiff, to sustain the issues on his part, called and examined, under oath as a witness, one A. F. Jencks, and interrogated said witness as to his opinion as to the feasibility of landing and holding rafts of logs if the said railway embankment of defendant were extended out to low-water mark on the bank of said river at said place. Whereupon defendant objected to said evidence, because defendant had no authority to make any such extension of its embankment, and because it was seeking to prove damages which are consequential and contingent, and it was immaterial and incompetent. Which objections the court overruled, and allowed said witness to testify that, in his opinion, in such case logs could not be held in said boom. To which ruling, at the time, the defendant duly excepted.

129 And be it further remembered, that upon the further trial of this cause, the plaintiff, to sustain the issues on his part, called and examined under oath, as a witness, one De Forrest Dorrance, and interrogated said witness as to his opinion as to the feasibility of landing logs at said boom in case of high water, it having been shown by said witness that there has been no high water since embankment was built, whereupon defendant objected to said evidence because the same was merely a matter of opinion, and related to contingent and consequential damages; which objection the said court overruled, and said witness thereupon testified that in his opinion it would be more difficult to land and hold logs there in high water since said embankment was put there; to which ruling, at the time, defendant duly excepted.

And be it further remembered, that upon the further trial of this cause, the plaintiffs, to sustain the issues on their part, called and examined under oath as a witness, William Renwick, one of the plaintiffs, and interrogated said witness as to the value and use of and description of the real estate contained in the lease of plaintiffs, which is situate north of the public highway called Front street on the plat and maps of said premises used in evidence in said trial, and interrogated said witness as to what damage was caused to said premises north of said Front street by the taking of said right of way by defendant, to which evidence defendant then and there objected on the ground that said premises north of said Front street are detached from and do not touch the said property taken for said right of way, and said premises north of Front street are not touched by said road, right of way, or embankment in any way. Which objections the court overruled; to which rulings the defendant then and there duly excepted.

130 And be it further remembered, that upon the further trial of this cause the plaintiffs to sustain the issues on their part further interrogated said witness, Wm. Renwick, as to the capacity of the planing mill situated on said leased premises of plaintiffs, and north of said river road, for the purpose of increasing the amount of damages to which plaintiffs claimed to be entitled in this cause—to which evidence said defendant then and there objected, on the ground that said planing mill is on the north side of said road, entirely detached from the property under consideration, not upon the same lots, and that said planing mill is not a part of the business of the saw-mill connected

with the Mississippi river. Which objection was overruled by the court, and said witness testified that said mill would plain' 30,000 feet per day etc. To which ruling defendant then and there duly excepted.

And be it further remembered, that upon the further trial of this cause, the plaintiffs, to sustain the issues on their part, called as a witness one J. S. Keator, who being duly sworn was examined by the plaintiffs, and was interrogated as to his opinion of the value of the said entire property described in the petition in this cause, prior to the taking of said right of way, that is the market value of the fee-title of said property. To which evidence defendant then and there objected, because the same was immaterial and incompetent, and because the real question in this case was the market rental value of the premises to a tenant during the term of plaintiff's lease.

Which objection was by the court overruled, and said witness thereupon testified that in his opinion prior to the taking of said right of way said property was worth $75,000.

To which rulings the defendant then and there duly excepted.

131 And be it further remembered, that upon the further trial of this cause, the defendant, to sustain the issues on his part, called as a witness one W. M. Suiter, who, being duly sworn, testified on behalf of defendant that he was a rapids pilot, engaged in piloting rafts, etc, over the rapids from Le Claire, Iowa, to Davenport, Iowa, and was acquainted with that part of the navigation of said Mississippi River. Whereupon defendant's counsel interrogated said witness as to whether or not the said pier or bulkhead of said plaintiffs built out into said river in front of their said mill, and over which said railway is built, was an obstruction to the navigation of said river. Which evidence the plaintiff then and there objected to as immaterial and incompetent

Which objection was by the court sustained, and the court refused to allow said witness to testify that as a matter of fact said bulkhead or pier extended out into the navigable part of said river below low-water mark, and was a material obstruction to navigation of said river. To which ruling the defendant then and there duly excepted.

Whereupon the defendant then and there offered to prove also by one Goldsmith, one Rhodes, David Le Claire, Antoine Le Claire, and various other witnesses that said bulkhead or pier was a material obstruction to the navigation of said river. To which evidence plaintiff objected as immaterial, and the court sustained said objection, and refused to allow said witnesses to so testify. To which rulings the defendant then and there duly excepted.

And be it further remembered, that upon the further trial of this cause, the defendant, to sustain the issues on his part, called as a witness one John Lambert, who being sworn, testified on behalf of de-

132 fendant that he was one of the commissioners, or a member of the sheriff's jury which assessed the damages of plaintiffs, from which this appeal is taken, and that he had known the property in question for many years. Defendant's counsel then interrogated said witness as to the value of said leasehold of plaintiffs before and after the taking and condemnation of said right of way; which evidence was objected to by the plaintiffs for the reason that said witness has not shown himself competent to give an opinion on the subject, and because the question asked directly for his opinion as to the amount of damages suffered by plaintiff. Which objections were sustained by the court, and said witness was not allowed to state his opinion as to said values, etc.

Defendant then offered to interrogate upon the same point John R. Boyle, one of said sheriff's jury, and also Horace Bradley, one of said

sheriff's jury, John Eldridge, one of said sheriff's jury, and James Baker, one of said sheriff's jury, and did x how and prove by all of these witnesses that they had been acquainted with said property for a long time, was member of said sheriff's jury, and had examined said property, and offered to interrogate them and prove by them the value of said premises both before and after such condemnation. Which evidence was objected to by plaintiff for the same reasons as stated in the evidence of said John Lambert; which objection was by the court sustained and said evidence was refused. To all of which rulings the defendant then and there duly excepted.

And be it further remembered, that upon the further trial of this cause, and after all the evidence was closed, and counsel for the respective parties had argued the cause to the jury, the court upon its own motion gave to the jury in writing the following instructions, being No. 1, to wit:

133 STATE OF IOWA,
Scott County:

In the circuit court of said county, March term, 1873.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT AND NORTHWESTERN RAILway Company.

1. GENTLEMEN OF THE JURY: The question in this case for you to consider and determine is, what amount of damages have the plaintiffs sustained by reason of the taking of the right of way by defendant, along the shore of the Mississippi River between high and low water line, not exceeding one hundred feet in width, in front of and adjacent to the premises situated upon the bank of said river of which the plaintiffs are lessees, their lease continuing till the 15th day of April, 1883?

To the giving of which instruction the defendant then and there objected for the reason that the same states and assumes that plaintiff is entitled to recover damages because defendant has occupied a space for its right of way between high and low water mark on the bank of the Mississippi River.

Which objection was by the court overruled, and said instruction was read to and given to the jury. To which rulings of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court upon its own motion also gave to the jury in writing the following instructions (being No. 2), to wit:

2. The premises aforesaid of which the plaintiffs are lessees, and were at the time of the taking of the right of way in controversy, and
134 which are particularly described in the petition of the defendant and report of the commissioners, are claimed by the plaintiffs to have a frontage upon the river bank at ordinary high water line of about thirteen hundred feet, and to be used by the plaintiffs in manufacturing, and in carrying on the general business of dealers in lumber. And also claim that there is located upon the premises a saw-mill, planing-mill, and other buildings, and a lumber yard, with ways, tracks, and other appliances, usual and necessary for carrying on their manufacturing and lumber business.

To the giving of which instruction the defendant then and there objected, for the same reasons stated to the first above instruction.

Which objections were by the court overruled, and said instruction was read and given to the jury.

To which rulings of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court, upon its own motion, also gave to the jury, in writing, the following instruction (being No. 3), to wit:

3. At the time of taking said right of way, the plaintiffs claim to have been using, in connection with, and in carrying on, their said business, the shore of the river in front of their premises, and extending out as far as the low water line of the river, and for the purpose of facilitating and aiding in landing and holding rafts and logs and getting the logs to their saw-mill that they had constructed, before the taking of the right of way, piers, booms and log-ways, and made other improvements upon the shore in front of their premises, and between high and low water marks, in and of their general business carried on upon the premises aforesaid, as shown by the evidence.

135 To the giving of which instruction the defendant then and the objected, for the same reasons stated to the first above instruction.

Which objections were by the court overruled, and said instruction was read and given to the jury.

To which rulings of the court the defendant then and there excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court, upon its own motion, also gave to the jury, in writing, the following instruction (being No. 4), to wit:

4. The plaintiffs are not now, and were not at the time of the taking of the right of way, the owners of the soil of the shore or land of the river between ordinary high and low water lines in front of their premises, but by reason of their premises lying contiguous to and abutting upon the shore, they were and are riparian proprietors, and as such proprietors were entitled to and had certain private rights in and to the use of the shore and water of the river in front of their premises, extending from ordinary high water line to the navigable portion of the river. Among these righis are those of access to the navigable part of the river from the point of their premises; and the right to construct between the ordinary high water line and navigable portion of the river, piers, booms, and logways, and to make other improvements for the purpose of their business.

To the giving of which instruction the defendant then and there objected for the reason that said instruction states that said plaintiff is entitled to unqualified and unobstructed access to the navigable part of said Mississippi River, instead of stating that they were entitled

136 to such access subject to the reasonable right of the public use of the same for railway purposes or otherwise, and also because it states that plaintiffs had or have the right to construct between ordinary high and low water mark, or down to the navigable portion of said stream, piers, booms, and logways, or to make other improvements of that nature for the purposes of their business, when said court should have instructed said jury that such piers, booms, log ways, etc., could not be legally constructed by plaintiff at all, or, if at all, only under direction of the Secretary of War of the United States, as is provided by the act of Congress of March 3d, 1873, and that only such constructions as should

not be obstructions to the navigation of said river. Which objections were by the court overruled, and said instruction was read and given to the jury. To which rulings of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time above mentioned, the court, upon its own motion, also gave to the jury in writing, the following instructions (being No. 5), to wit:

5. These rights of the plaintiffs are valuable rights; they are property, and while they must be enjoyed in due subjection to the rights of the public, they cannot be destroyed or impaired, or taken and appropriated by the defendant for the purposes of their railway, without due compensation being made to, therefor, the plaintiffs. It is true the defendant was authorized to take the right of way, and to construct and operate its road thereon, and if necessary may occupy the entire right of way for that purpose, but it is nevertheless liable for the injury to the plaintiffs caused by the exercise of such authority and right.

To the giving of which instruction the defendant then and there objected,
for the same reasons stated as to the said fourth instruction, and
137 also because it states that the defendant is liable to make compensation to the plaintiff for taking and appropriating said right of way on the bank of said river below ordinary high water mark, or that the defendant is liable to the plaintiffs for any injury caused to them by the exercise of such authority to take and appropriate, when in fact said instruction should have stated that plaintiffs were not entitled to compensation for such taking and appropriation.

Which objections were overruled by the court, and said instruction was read and given to the jury.

To which rulings of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court, upon its own motion, also gave to the jury, in writing, the following instruction (being No. 6), to wit:

6. The plaintiffs claim to be owners of a lease of the said premises that has six years and seven months to run from the time of the taking of the right of way—the lease terminating on the 15th day of April, 1883—and the damages they are entitled to recover of the defendant herein, if they are the owners of such a lease, are the damages to the value of the use of said premises for the term of their lease from the time the right of way was taken, Sept. 14, 1876, to the expiration of their lease.

The fact that the right of way is located between ordinary high and low water line on the shore of the river, and that the plaintiffs are not the owners of the soil of the shore, does not exonerate the defendants from liability for damages to the plaintiffs caused by the taking of the right of way in controversy.

To the giving of which instruction the defendant then and
138 there objected, for the same reasons stated as to the fifth of said instructions, and also because it states that said plaintiffs are entitled to recover damages to their said leasehold interest, and because it states that the fact that the right of way is located between ordinary high and low water lines on the shore of said river does not exonerate the defendant from liability for damages, which said instruction should state the contrary.

Which objections were overruled by the court, and said instruction was read and given to the jury.

To which rulings of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court, upon its own motion, also gave to the jury, in writing, the following instruction (being No. 7), to wit:

7. For the purpose of this controversy, and in considering and determining the damages the plaintiffs are entitled to recover in this case, you are to consider not only the rights, privileges, and improvements of the plaintiffs upon the shore of the river already referred to, but you are to consider the entire premises of which the plaintiffs are lessees, and necessarily and properly used by them in their business, and which are described in the petition and report of the commissioners in this case.

The fact that a street or highway passes through said premises does not have the effect to confine your consideration to the part lying between such street and the river; and you are instructed to consider the premises aforesaid as a whole, an entire tract, the portions both north and south of the street, or so much thereof as may be necessary in their business; and also the rights, privileges, and improvements of the plaintiffs upon the shore in front of their premises.

139 To the giving of which instruction the defendant then and there objected for the same reasons as stated in relation to the 4th and 5th instructions aforesaid; and also because it is stated therein that the jury could consider damages to property disconnected with said river bank and separated from the said river by a street, and not used for or in connection with said saw-mill property, but used for planing mill, lumber yard, and other purposes.

Which objections were overruled by the court, and said instruction was read to and given to the jury.

To which ruling of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court upon its motion also give to the jury in writing the following instruction (being No. 8), to wit:

8. The rule to be observed by the jury in ascertaining the damages in this case is the following:

First, determine from the evidence the fair market value of the use of the premises, annually, before the taking of the right of way—and then the fair market value of the annual use of the premises after the taking the right of way by the defendant; and the difference in the values thus found multiplied by the number of years and fraction thereof from the time of taking the right of way, September 14th, 1876, to the expiration of plaintiffs' lease, April 15th, 1883, will be the sum or amount of the damages the plaintiffs are entitled to recover. In other words, the difference between the yearly values of said premises as found by the rules above given, multiplied by six and seven-twelfths, will give the amount of the plaintiffs' damages they are entitled to recover.

140 To the giving of which instruction the defendant then and there objected for the same reasons stated as to the 4th, 5th and 7th of said instructions, and also because it is assumed by the court in said instruction that the title of plaintiff was and is a leasehold, having a duration of six seven-twelfth years, and that the damage should in all events be found for that time.

Which objections were overruled by the court, and said instruction was read and given to the jury.

To which rulings of the court the defendant then and there duly excepted.

And be it further remembered, that on the trial of this cause, and at the time last above mentioned, the court upon its own motion also gave to the jury in writing the following instruction (being No. 9), to wit:

9. In determining the depreciated value of the use of said premises, it will be your duty to consider the evidence relating to the condition and use of the premises before the taking of the right of way, and their changed condition by reason of the taking of the right of way, and the construction and operation of the defendant's road thereon in a reasonable and lawful manner.

And you may, also, consider any other matters established by the evidence resulting directly from taking the right of way for the purposes of said railroad that affect and depreciate the market value of the use of said premises. But the plaintiffs cannot recover damages which in their nature are so remote that they cannot be regarded as the direct and necessary result and consequence of the taking of the right of way. Nor is the defendant entitled to have the particular manner in which the road is constructed considered in reduction of the damages occasioned by taking the right of way.

To giving of which instruction the defendant then and there objected for the same reasons stated in relation to the 4th, 5th, 7th and
141 8th of said instructions, and also because it states that the jury should not take into consideration in estimating said damages, the particular manner in which said road is constructed, etc., when said instruction should have stated that if the jury find that said defendant condemned said right of way, and was compel'ed to construct and operate its said road, according to the terms of and in pursuance of the conditions of an ordinance of the city of Davenport, where said premises are situated; and that said ordinance provides that defendant was only entitled to condemn and use said right of way only for a single track railway, and that the same should be constructed and operated so as not in any manner to materially injure damage, or incommode any of the residents of or business of said city. Then that such ordinance and obligations should have been considered by the jury in assessing said damages, and said instruction should also have stated that the fact that said defendant had built and was operating said roadway, and had occupied for that purpose only a small part of said 100 feet named in said condemnation notice, and had left openings, log-ways, etc., for the use and accommodation of plaintiffs, should have been received by said jury and considered in measuring said damages. Which objections were overruled by the court, and said instruction was read and given to the jury. To which rulings of the court the defendant then and there duly excepted.

And be it further remembered that on the trial of this cause, and at the time last above mentioned the court, upon its own motion, also gave to the jury in writing the following instruction (being No. 10), to wit:

10. Nor can you consider in estimating the plaintiff's damages their unwillingness to part with their rights and improvements for the
142 purpose of said road, or their unwillingness to have their rights and privileges as riparian proprietors obstructed and impaired by taking the right of way. Nor can you take into consideration in estimating the plaintiff's damages, for the purpose of reducing or diminishing the damages, any advantages, if any, that may result to the plaintiffs on account of said road. Though the plaintiffs may derive

some benefits or advantages from the construction and operation of the defendant's road, such benefits or advantages cannot be estimated and set off against, or in any manner applied to the reduction of the damages to the plaintiffs' property by taking the right of way. In other words, the plaintiffs, in the plain language of the supreme law of the State, are entitled to just compensation for the injury to their property by taking the right of way, without taking into consideration any advantages that may result to them.

To the giving of which instruction the defendant then and there objected for the same reasons stated in relation to the 4th, 5th, and 9th of said instructions, and also because it stated that no benefit or advantage to said property from the construction and operation of defendants road could be considered by the jury in estimating said damages.

Which objections were overruled by the court, and said instruction was read to and given to the jury.

To which rulings of the court the defendant then and there duly excepted.

And be it further remembered that on the trial of this cause, and at the time last above mentioned, the court upon its own motion also gave to the jury in writing the following instruction (being No. 11), to wit:

143 11. In ascertaining the amount the plaintiffs are entitled to recover, it will be the duty of the jury to examine with great care, and even with searching discrimination, the testimony of the respective witness, and give to the testimony of each such weight as it may be entitled to because of the candor and evident want of bias or prejudice on the part of the witness for or against either of the parties hereto, and because of the witness' position and ability to know, and actual knowledge of the matters to and about which he has testified. And after such an examination you will return a verdict warranted by the evidence and the rules of law as herein given you, and the form of your verdict will be as follows:

"We, the jury, find for the plaintiffs, and assess their damages at dollars."

And let your verdict be signed by your foreman.

(Signed) D. W. ELLIS,
Judge.

To the giving of which the defendant then and there objected for the same reasons stated in relation to the 4th, 5th, 9th, and 10th of said instructions, and also because it states to the jury that they must find for the plaintiff in some amount as their verdict, and were not at liberty in any event to find a verdict for the defendant. Which objection was overruled by the court, and said instruction was read and given the jury. To which rulings of the court the defendant then and there duly excepted.

And be it also remembered that on the trial of this cause, and at the time last above mentioned, the plaintiff requested the court to give to the jury in writing the following instruction (being No. 1 asked by plaintiffs), to wit:

144 RENWICK, SHAW & CROSSETT, vs DAVENPORT & NORTHWESTERN RAILway Co.

Instructions asked by plaintiffs.

1. If you find from the evidence that the plaintiffs are, and were at the time of the commencement of these proceedings, the lessees of the premises described in the proceedings for a term of years not yet expired, and that said premises are situated upon the Iowa bank of the Mississippi River, and that the plaintiffs then were and still are carrying on a business upon said premises in any way connected with the navigation of said river, or to which the said navigation is a proper or convenient adjunct, then it would not be lawful for the defendant to construct or operate a railroad between said premises of plaintiffs and said river, unless the injury and damage to the plaintiffs occasioned thereby should first be ascertained and compensated in the manner provided by law for ascertaining the compensation to be made for private property taken for public use.

(Given.)

To the giving of which instruction the defendant then and there objected for the same reasons stated in relation to the 4th and 5th instructions given by the court on its own motion, and also because said instruction states that it would not be lawful for the defendant to construct or operate its railroad between said plaintiffs' property and the said river without first having ascertained and compensated plaintiffs for damages occasioned thereby. Which objections were overruled by the court, and said instruction was read and given to the jury. To which ruling of the court the defendant then and there duly excepted.

And be it further remembered that, on the trial of this cause, and at the time last above mentioned, the plaintiffs requested the court
145 to give to the jury in writing the following instruction (being instruction No. 2 asked by plaintiffs), to wit:

2. If you find from the evidence under the law as given to you that the plaintiffs are injured and damaged by the construction and operation of the defendant's railroad, the damages to which the plaintiff's are entitled will be the difference between the value of the use to the plaintiffs' premises, as they were before the construction of the railroad between them and the river, and the value of said use after the right of way has been taken by the defendant for the remainder of the term of the lease from the time of the condemnation to the end of the term.

(Given.)

To the giving of which instruction the defendant then and there objected, for the same reasons stated in relation to the last above instruction.

Which objection was overruled by the court, and said instruction was read and given to the jury.

To which ruling of the court the defendant then and there duly excepted.

And be it further remembered that on the trial of this cause, and at the time last above mentioned, the plaintiff requested the court to give to the jury in writing the following instruction (being instruction No. 3 asked by the pl'ff), to wit:

3. In determining the extent and character of the injury and damages (if any) to the plaintiffs, you are authorized to consider the fact that the defendant acquires by these proceedings the right to occupy the space of 100 feet in width, if there be so much between high and low water mark in front of plaintiffs' premises for the ordinary uses of constructing and operating a railroad in a reasonable and proper manner, and, for this purpose, to construct in a proper and skillful
146 manner such embankment and switches as defendant may deem necessary, and as may be proper and convenient for a railroad.

(Given.)

To the giving of which instruction the defendant then and there objected, for the same reasons stated in relation to the ninth instruction, given by the court on its own motion.

Which objection was overruled by the court, and said instruction was read and given to the jury.

To which rulings of the court the defendant then and there duly excepted.

And be it further remembered that on the trial of this cause, and at the time last above mentioned, the plaintiff requested the court to give to the jury, in writing, the following instruction (being instruction No. 4, asked by the plaintiff), to wit:

4. If you find, from the evidence, that the plaintiffs were the lessees of the premises described in the application of the defendant in this case, and were operating a saw-mill upon said premises, and carrying on the business of manufacturing and selling lumber thereon; and if you find that a public highway runs across said premises parallel, or nearly so, with the river, the saw-mill being situated between said highway and the river, and on land bounded by the river; and that the portion of said premises on the other side of said highway was purchased and used by the plaintiffs' lessor, or those under whom he claims, for the purposes of said saw-mill business, along with the land on which said saw mill stands, and was leased with said mill to the plaintiffs, and has been used by them, on good faith, in connection with said mill, for piling and storing lumber thereon, and other purposes of said lumber business, is reasonably necessary therefor, then the plaintiffs
147 will be entitled to recover for damages to their interest in the entire property by reason of the construction of the railway.

(Given.)

But if you find that any part of said premises was not at and prior to said proceedings to appropriate right of way for the railroad, used in good faith as a grant of said saw-mill premises, and for the purposes of said business, you will not consider nor include in your verdict (if you find any damage to their interest in such part of said premises).

To the giving of which instruction the defendant then and there objected for the same reasons stated in relation to the 7th instruction given by the court on its own motion. Which objection was overruled by the court, and said instruction was read and given to the jury. To which rulings of the court the defendant then and there duly excepted.

And be it further remembered that on the trial of this cause, and at the time last above mentioned, the defendant requested the court to give to the jury, in writing, the following instructions (being numbered from one to twenty-six, both included), as follows, to wit:

The defendants ask the court to charge the jury as follows:

1. That the Mississippi River, in the State of Iowa, is a navigable stream, and the owner of the land adjoining the same has no private right in the property in the water of the river or the shore between high

and low water mark, but the ownership of so much of the shore as is situated between high and low water marks belongs to the public and is within control of the State for public purposes, and it is competent for the State to authorize the construction of a railroad along such shore between high and low water marks, so as not to interfere with the
148 navigation of the stream, and if the construction of such railroads necessarily cuts the adjoining owner off from all communication between his land and the river, otherwise than across said railroad, he is not entitled to compensation.

(Refused.)

2. If the jury believe that the right of way sought to be condemned in this case is located the whole length of the plaintiffs' land upon the river bank or shore between ordinary high and low water marks, and the plaintiff is thereby cut off from the river otherwise than across said road, they are not entitled to recover damages therefor.

(Refused.)

3. That if the jury shall believe from the evidence that right of way which the plaintiff seeks to condemn is under and by evidence of an ordinance of the city of Davenport, the terms of which are accepted by the defendants, whereby they have agreed to build a single-track railroad between high and low water mark of the Mississippi River in front of the plaintiffs' premises in the said city, that the defendants are estopped from building their railroad in any other way than as authorized by said ordinance, and that they cannot use or appropriate any more land between high and low water mark under their assessment than is necessary for a single-track road.

(Refused.)

4. That under said ordinance and the laws of the State, the defendants are required to construct their road in front of the plaintiffs' premises in a reasonable and proper manner and to furnish suitable and proper openings in any embankment they may build, to enable the plaintiff to have access to the water for their business, and if their business is that of sawing logs from the river the defendants are required to leave proper and adequate openings to get to the water for all the plaintiffs' business, and that the plaintiffs have the right to use all such
149 openings and all embankments made by the defendants for holding and retaining rafts of logs intended for plaintiffs' business, and the plaintiff cannot recover any damages in this proceeding for the right to build said road-bed in a reasonable and proper manner.

(Refused.)

5. That the plaintiffs in the proceedings are not entitled to recover any damages, under the act of the legislature of the State of Iowa, in relation to riparion proprietors for building the defendants' road, between any cribs or bulkheads or piles of saw-dust, and waste materials between such cribs and the main shore, because the Congress of the United States had, by the act of 3d March, 1873, legislated in relation to putting such obstructions in the river, and it was incompetent for the legislature of Iowa to pass the act of 18th March, 1874, in relation to the navigable waters of the Mississippi.

(Refused.)

6. That the plaintiff cannot recover for any damages under the act of 18th March, 1874, if the jury believe from the evidence that the crib and obstructions in the river in front of plaintiffs' premises is a material obstruction to the navigation of the river.

(Refused.)

7. That the plaintiffs cannot recover, in this action, any damages for

the construction of the railroad, unless the crib or obstruction put in the river by Renwick, between high and low water marks, or beyond low-water mark, was authorized by the Secretary of War, under the act of Congress of 3 of March, 1874; and that if said structure was not authorized by said act, and obstructs the free use of the river between low and high water marks, the same is a nuisance, and no person can recover damages for a nuisance, or injury caused thereto, which is put in the Mississippi River.

(Refused.)

8. That the plaintiffs, under the act of legislature of 18th of
150 March, 1874, are not entitled to any damages, except for injuries to rafts, logs, floats, and other water crafts, and that the injury for the construction of the road between the riparian owner and the crib constructed by them is limited, not to the injury to their property in general, but to the property protected by the crib, and the business of sawing logs in a saw-mill, and no other property whatever.

(Refused.)

9. That under the said act the plaintiffs are not entitled to recover for loss of rents for dwelling-houses on the river-bank above high-water mark, not touched by the railroad.

(Refused.)

10. That under that act the plaintiffs are not entitled to any supposed damages to the business of a planing-mill not situated on the river-bank, and used to plane and fit dry timber for sale after it's sawed out of logs.

(Refused.)

11. That remote and possible damages to the plaintiffs' business connected with the river are not to be taken into consideration by the jury in estimating the plaintiffs' damages.

(Refused.)

12. That damages dependent on a remote condition, which may never happen, as injuries which may happen from high water, are not to be taken into consideration by the jury.

(Refused.)

13. That the true measure of damages is the difference in value of the property before the railroad was built in front of it and after it is built, and if there be such a difference, then such a sum of money as will make the property as good after as before, is the true measure of damages.

(Refused.)

14. That the property to which the plaintiffs are entitled to damages is the property connected with the crib or bulkhead of the plaintiffs, and not property on the river used for the storage of timber when sawed, or property off the river used for the storage or manufacture of lumber.

(Refused.)

151 15. That the plaintiffs, as lessees, are entitled to damages only for their lease, and that damages to be awarded to them is in the proportion of the value of their lease to the estate in fee.

(Refused.)

16. That neither the rent which the plaintiffs pay for the property nor the taxes and insurance which they pay on the property constitute any element whatever of damages to them.

(Refused.)

17. That the value of the diminished use of the property to the plaintiffs for the time such diminution continues is the measure of damages, and if this time is so uncertain as not to admit of reasonable computation, the plaintiff is not entitled to recover anything.

(Refused.)

18. That under the provisions of section 1265 of the code of 1873, it is the duty of the defendant in building its road in front of the Mississippi River, in Davenport, along which is the plaintiffs' saw-mill so as not to unnecessarily impair the travel, transportation, or navigation upon said river, that under this section the defendants are required to make both openings and crossings in their road, so as to give the plaintiffs convenient access to the river for their business. That the failure to construct their road as required by said statute is not the subject of assessment of damages in this proceeding, but of an independent suit to enjoin the use of the property until it is built properly under the statute or an action of law.

(Refused.)

19. That a railway company by process of condemnation, does not get a title to the land condemned, but an easement in it, and that the owner of the fee, or riparian owner, has a right to use and cross over or under the railway, or the embankment for the purpose of transacting his own business, doing no needless injury to the railway property.

(Refused.)

152 20. The plaintiffs in this cause are only entitled to recover such damages as shall be just compensation to them, as lessees of said property, by reason of the defendant taking and using for its road the property described in the petition in this cause; and in arriving at the amount of such compensation you are not to consider said defendant as a wrong-doer, nor are you to consider any unwillingness on the part of plaintiffs to allow said defendants to so use said premises. There is a tacit condition attached to the title by which every individual holds his land, that in case it be required for public use it may be taken for its simple value in the market.

(Refused.)

21. In ascertaining the depreciated value of the premises after deducting that part which has been taken by the defendant for said railway, regard must be had only to the immediate and not remote consequences of the appropriation. The value of the remaining premises is not to be depreciated by heaping consequences upon consequences.

(Given.)

22. In ascertaining the depreciated value of said premises, by reason of the taking of said part for the uses of defendant for said road, you are not to take into account any supposed or alleged increase in the fire risk on plaintiff's mill property and lumber, on account of the construction and operation of the said railway of defendant.

(Given.)

23. If you find, from the evidence, that the embankment made by the defendant between high and low water mark on the Mississippi river, in front of the mill property of plaintiffs, diminishes the capacity of the log boom of plaintiffs for receiving and holding logs, and thereby damages the said property; and if you further find, from the

153 evidence, that the said damages to said log boom, so caused by said railway embankment, can be prevented and guarded against by the exercise of ordinary efforts and a moderate expense by said plaintiff, then said defendant is liable only for damages based upon the costs and expenses of such preventive means, and not for contingent and possible damages which may accrue to plaintiffs by a want of due diligence in taking such preventive measures.

(Refused.)

24. If you find, from the evidence, that the embankment made by the

defendant between high and low water mark on said Mississippi River, in front of the mill property of plaintiffs, diminishes the capacity of the log boom of plaintiffs for receiving and holding logs, and thereby damages the said property; and if you further find, from the evidence, that the said damage to said log boom, so caused by said railway embankment, can be prevented and guarded against by the building and erection of a pier, crib, or bulkhead, running out from the shore into the river, at a point a short distance above said boom, so as not to materially obstruct the navigation of said river; and that such crib, pier, or bulkhead can be built and constructed by the exercise of ordinary efforts, and at moderate expense, considering the nature of the work and object to be accomplished; then said defendant is liable only for damages in this cause based upon the cost and expense of making, constructing and maintaing such crib, pier, or bulkhead, and not for contingent and possible damages which may accrue to plaintiffs by a want of due diligence in making and constructing such crib, pier, or bulkhead.

(Refused.)

25. Injuries which might result from unauthorized or unlawful acts of the defendant in using the said premises for its said railway, are not to be considered by the jury in estimating the damages for the taking of said property.

(Given.)

26. Evidence of mere opinion is always unsatisfactory, yet in determining the value, such evidence is admitted from the necessity of
154 the case; but you are to consider such opinions in connection with the facts, if any have been stated, upon which such opinions are based.

(Refused.)

Which instructions the court then and there refused to read or give to the jury, except the instructions marked Nos. 21, 22 and 25, which were read and given to the jury, but all the other of said twenty-six instructions the court refused to give or read to the jury, and marked the same "refused" on the margin of the same. To which rulings of the court the defendant then and there duly excepted, for the reasons stated in the written objections and exceptions to said instructions filed in this cause by defendant. And the foregoing were all the instructions given to the jury on said trial, or asked by either party, or refused to be given by the court.

And be it further remembered, that on the further trial of this cause, and after the said jury had returned their verdict into court in this cause, the defendant filed herein his motion to set aside said verdict, and for a new trial in this cause, which motion is in the words and figures following, to wit:

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT & NORTHWESTERN RAILway Company. } No. 2591.

In the circuit court of Scott County, Iowa.

The above named defendant moves the court that the verdict of the jury rendered in this cause be set aside, and for a new trial in this court of the above entitled cause, upon the following grounds:

Said verdict is not sustained by sufficient evidence, and is contrary to the evidence. Which evidence is as follows, to-wit:

(The following here inserted is all the evidence offered or received on the trial of this cause, as reported by the official reporters.—DOSH BROS., *Reporters.*)

155 (The clerk will here insert all the evidence taken, offered, and received on the trial of this cause.)

And the foregoing being all the evidence given and received on the trial of this cause, the same is hereby made a part of the record.

Motion for new trial continued.

2. Said verdict is contrary to the law.

2. The damages awarded by the jury in this cause are excessive.

4. The court erred in excluding evidence offered by said defendant on the trial, and to which ruling defendant then and there duly excepted, as more fully appears by reference to the testimony taken down on the trial by the official reporter.

5. The court erred in admitting evidence offered by the plaintiffs on the trial, against the objection of defendant, and to which ruling said defendant then and there duly excepted, as more fully appears by reference to the testimony taken down on said trial by the official reporter.

6. The court erred in refusing to give to the jury the instructions asked for by the defendant, and numbered from one to twenty both inclusive, and also numbered 23, 24, and 26, and which ruling was then and there duly excepted to by defendant.

7. The court erred in giving to the jury against the objection of defendant the instructions asked for by plaintiff, and numbered from one to four, both inclusive, and which ruling was then and there duly excepted to by defendant.

8. The court erred in giving to the jury, against the objection
156 of defendent, the instructions given to the jury by the court on its own motion, and numbered from one to eleven both inclusive, and which ruling was then and there duly excepted to by defendant.

9. The court erred in excluding evidence offered by defendant, tending to prove that *that* the piers, booms, etc., erected by plaintiffs along the river bank in front of his said property in dispute were and are obstructions to navigation and nuisances, to which ruling of the court the defendant then and there duly excepted.

10. The court erred in excluding evidence offered by the defendant, tending to prove that the railway embankment along in front of said property of plaintiff, erected and used by defendant, was and is built with openings, logways and roads, and with all possible conveniences for the accommodation of the said plaintiffs in operating their said saw mill; and that said embankment as constructed constitutes no material obstruction to or damage to the said boom, etc., of plaintiff; to which ruling defendant then and there duly excepted.

11. The court erred in admitting evidence offered by plaintiff, and against the objection of defendant, tending to prove damages to plaintiff's property by the taking and using of space between high and low-water mark on the bank of the Mississippi River, in front of plaintiff's property, to which ruling defendant then and there duly excepted.

GRANT & GRANT, AND
BILLS & BLOCK,
Att'ys for Def't.

Which motion to set aside said verdict, and for a new trial, was, by the court, overruled, and judgment was ordered on said verdict.

157 To which rulings of the court the said defendant then and there duly excepted.

And defendant asked the court to sign this his bill of exceptions, and make the same a part of the record of this cause, which is done accordingly.

May 30, 1878.

D. W. ELLIS, *Judge.*

All of said proceedings were had within the time and manner prescribed by law and the rules of the court, and said appeal otherwise duly perfected.

The exhibits in this case, A, B, L, M, O, P, R, S, and T (p. 20, 21, 76, 96, 103, 105, 121), consist of maps and plats which cannot be sufficiently reduced in size to put into this abstract, nor can they be photographed or engraved except at very great and useless expense, and we beg leave of the court to refer to the original on file with the transcript herein.

EXHIBIT C.—(See p. 64.)

This article of lease by and between William Renwick, of first part, and Renwick, Shaw & Crossett, of second part, witnesseth:

That said first party hereby leases unto second party for eight years, from and after April 15, 1875, the following property in Scott County, Iowa: That portion of what is known as Le Claire's Lower Reserve, particularly described as follows, to wit: Beginning at southwest corner of the tract of land sold by Antoine Le Claire to A. D. Churchill, at a point on bank Mississippi River, in Davenport; thence running north 642 feet; thence west 330 feet; thence south to south line highway leading from Davenport to Le Claire; thence southwesterly along south line of said highway, eighty feet; thence south to river; thence easterly along meanders of said river to place of beginning, and saw-mill and planing-mill thereon and fixtures thereto belonging, and all block one of

158 Churchill's addition, except part heretofore sold to Dunkhorst and any part used for highway. And first party also leases to second party the right to tie rafts or logs that may be purchased, along bank of said river adjoining any other lands owned by him and bordering on said river, and two two-horse teams, and four lumber wagons and harness, one safe in office, and all office furniture, and all other personal property used in connection with said mill and lumber yard, to be enumerated in a schedule to be attached hereto as Exhibit A, and made part hereof; with understanding that first party may before April 1, 1875, put in new engine sufficient to carry all machinery, new shafting, etc., an additional boiler, and cause all said machinery to be put in good running order. In case of destruction of either of said mills before April 1, 1880, from any cause except carelessness and negligence of lessees, the first party agrees to rebuild within a reasonable time. And second party agrees to pay first party in consideration of lease yearly rent of $7,000, payable in equal semi annual payments of $3,500 October 1, 1875, and April 1, 1876, etc., and rent shall be lien on all lumber and lath and shingles and other property had, kept, or used about premises, regardless of exemptions from execution; and second party agrees to pay all assessments and taxes levied or assessed at any time during term of lease, and to insure premises in good companies acceptable to first party in sum of $25,000, payable to first party. Second party agrees to keep mills in good running order, and to so return them at end of lease, unless destroyed as aforesaid, and to return all personal property,

value of which to be appraised in said schedule. If saw-mill destroyed after April 1, 1880, it is optional with first party to rebuild, and if he does not, shall immediately notify second party in writing, and lease shall then terminate; and if planing-mil, is destroyed after April 1, 1880, first party will immel
159 diately rebuild, if lease is then in force; and if saw mill is destroyed and rebuilt, second party shall pay first party for time from destruction to rebuilding and putting mill and machinery in order only half agreed rent; and second party shall leave dwellings and office on premises in as good order as received, damage by the elements and natural wear excepted; and if second party fails to pay taxes or insurance, first party may do so, and shall receive ten per cent. interest on money so invested. If second party can't get $25,000 insurance, shall pay first party same pro rata rate to carry balance. Shaw or Crossett may each, at option of either, purchase one-third of said property on or before April 1, 1878, at rate of $70,000 for whole, except if saw-mill destroyed, shall elect at once, in which case shall be entitled to like portion of insurance collected. Purchase money to be paid, half at time of election, and balance in three equal payments, with ten per cent. interest. This lease and agreement subject to agreement of first party with Davenport and St. Paul Railroad, dated July 7, 1873. In case of purchase, lease shall cease.

If only one purchases, he shall receive like portion of rents and become equally liable with first party to keep and perform covenants by him undertaken herein.

(Signed) WM. RENWICK.
GEORGE S. SHAW.
E. S. CROSSETT.

DECEMBER 11, 1874.

The schedule introduced with this lease, marked C L (see p. 75), contains a full list and description of the personal property used in and about said saw-mill and premises and its appraised value and it is a part of the property leased with said saw-mill premises, and for which said consideration of $7,000 a year was agreed in said lease to be paid by said lessees.

160 The appellant has been unable to obtain said schedule, although it has made diligent search therefor among the papers in this case, and has applied therefor to the clerk of said court, the reporter, the appellees and their attorneys, and hence cannot present herewith any abstract thereof.

Exhibit D (see p. 74) is deed from Elizabeth Renwick and husband, dated Oct. 14, '73, consideration $20,000, and conveyed the following described property, being property in controversy herein: Undivided half mill property, described as follows, to wit: Beginning at southwest corner of a parcel of land on Mississippi River, sold by A. LeClaire to A. D. Churchill, thence north 642 feet less a strip of land taken for street purposes, thence west 330 feet, thence south 906 feet less said strip to the bank of the Mississippi River, thence east on meanders of river to beginning, and containing 5.85-100 acres.

Exhibit E (see p. 74) is deed from Churchill to Wm. Renwick, date June 7, '72, consideration $10,000, commencing at northeast corner block one, Churchill's addition to Davenport, thence south to low-water mark on Mississippi River; thence in southwesterly direction on low-water mark to a point intersecting east boundary line of said addition, if carried out; thence north to northwest corner of block one, on Front street;

thence along south side Front street to beginning, not including any appropriated by city for widening said street.

Exhibit F (see p. 74) quit-claim deed from Mrs. Lionel A. Worth to Wm. Renwick, date April 2, '66, consideration $2,500, commencing on bank of Mississippi River, southwest corner tract land sold by A. Le Claire to A. D. Churchill; thence north 642 feet; thence west 330; thence south 906 feet to said River; thence up said river with meanders to beginning, containing 5.85-100 acres, known as Renwick mill property. Also parcel of land commencing at southwest corner of said mill property; thence southwesterly along Mississippi River eighty feet; thence due north 133 feet to road leading from Davenport to LeClaire; thence easterly on said road eighty feet; thence south 175 feet to beginning.

161

Exhibit G (see p. 74) is a deed from Antoine Le Claire to James Renwick, dated Dec. 21, 1855; consideration, $1,000: Commencing at southwest corner of a parcel of land conveyed by grantors to said Renwick, which parcel is known as the "Renwick mill property," running thence southerly with the meanders of the Mississippi River eighty feet; thence due north 153 feet, more or less, to the road running from Davenport to Le Claire; easterly along said road eighty feet, to the northwest corner of first-mentioned parcel of land; thence along western boundary of said parcel south 175 feet, more or less, to beginning, with all rights and privileges of river front.

Exhibit H (see p. 74) is a deed from A. Le Claire to James Renwick, dated January 3, 1854; consideration, $1,000: Beginning at a point 396 feet from the bank of the Mississippi River, on the west line of a tract of land recently sold by said A. Le Claire to A. D. Churchill, thence north 132 feet, thence west 330 feet, thence south 132 feet, thence east 330 feet, to beginning, containing one acre.

Exhibit I (see p. 74). Deed from A. Le Claire to James Renwick, dated August 21, 1854; consideration, $4,000: Beginning on the bank of the Mississippi River at the southwest corner of the tract of land recently sold by said A. Le Claire to one A. D. Churchill, and running thence north 396 feet, west 330 feet, thence south 660 feet to the Mississippi River, thence up the meanders thereof to the place of beginning, with all the rights of the river front, containing four acres.

162

Exhibit J (see p. 74). Deed from A. Le Claire to James Renwick, dated June 28, 1855; consideration, $863: Commencing at northwest corner of land now owned by Renwick, and which land is described in a deed from said A. Le Claire to James Renwick, thence east 330 feet to land of A. D. Churchill, thence south on said Churchill 114 feet, and thence west 330 feet to beginning, containing 863-1000 of an acre, more or less.

Exhibit K (see p. 74). Deed Wm. Renwick to J. W. Dunkhorst, date August 30, 1872; consideration, $1,535: Commencing at a point on south line Front street 116½ feet westerly from northeast corner of block 1 in A. and G. C. Churchill's addition to Davenport, thence southeastwardly parallel with east line lot 17 in said block 1, 117 feet, thence westwardly and parallel with south line of Front street 42 feet, thence northwestwardly and parallel with east line of said lot 17, 117 feet to south line Front street, thence northeastwardly along south line of Front street 42 feet to beginning, and right to lay pipes and culverts from south side of said lot to river across property of grantor. Grantor reserves title to land south of said tract to low-water mark of Mississippi River.

Exhibit N is the ordinance of the city of Davenport, dated May 26, 1876, granting to appellant right of way within city limits, and acceptance thereof by appellant; said ordinance is as follows:

AN ORDINANCE designating and determining the particular line of the right of way granted to the Davenport & St. Paul Railroad Company by an ordinance passed and approved May 11, 1870, regulating the use of the streets thereunder, and repealing chapter 48 of the revised ordinances of 1875 (p. 90).

Whereas, by an ordinance passed May 11th, 1870 (being chapter 47 of the revised ordinances of 1875), the general rights of way, with
163 certain privileges and rights, were granted to the Davenport & St. Paul Railroad Company; and

Whereas, said ordinance provides that, in case of the sale of the road of said Davenport & St. Paul Company under mortgage foreclosure on unpaid bonds, the franchises and privileges granted by said ordinance shall pass to the purchasers thereof; and

Whereas, said road, with all its franchises, has been sold under a mortgage foreclosure to William B. Bonn, of the city of New York, who now owns and controls the same, in trust, however, and for the use and benefit of the bondholders thereof; and

Whereas, it is now desired by William B. Bonn, purchaser of said railroad aforesaid, that the particular line upon which may be laid the track of said railroad be defined and designated, and the manner and use of the streets and of the river bank be determined; therefore,

Be it enacted by the city council of the city of Davenport:

SECTION 1. That the right is hereby granted by the city of Davenport to said William B. Bonn, as trustee for the bondholders of the Davenport & St. Paul Railroad Company, to lay down in said city a single track of its said road, commencing at a point on the west line of Spring street, which said point is thirty-two (32) feet north of the line of a public highway known as the Davenport and Le Claire road or Front street; running thence southwesterly along the said Davenport and Le Claire road or Front street to a point on the south line of said road or Front street, not to exceed one hundred (100) feet west of the west line of a building known at Severn's brewery; thence continuing southwesterly along the bank or shore of the Mississippi river to a point south of Shield's woolen factory; thence along the bank of the Mississippi River on the south side of Daniel Gould's furniture factory and Renwick's saw-mill to a point on the levee opposite the south side of Third street where said Third street intersects the Davenport and Le Claire road or Front street; thence along the levee or river bank to Farnam street; thence crossing Front street to the alley in block seventy-five (75); thence along said alley across Le Claire street on the north side of the government bridge, to and across Second street and Iowa street to Front street, at a point east of Rock Island street; thence along the south side of said Front street and the levee to Warren street.

Provided, however, so far as the city council may have the power so to do, it consents that said line may be extended from said point opposite the east end of Third street, along the river bank and Front street to a point forty-six feet south of the land pier of the new railroad bridge; thence to the south side of Front street at a point east of the west line of Iowa street where said Iowa street extended would strike the river; thence along said Front street to Brady street; thence along the
164 levee and Front street to Warren street. And if in crossing the approach to said government bridge forty-six feet south of said land pier of said bridge, which must be done at grade, it shall become necessary for the owners of the said road to raise the grade of the said Front street on both sides of said crossing, above the grade of any of the streets so run over, along, or across, it shall be the duty of the owners of said road to provide and complete such approaches to such crossings

in a manner as fully set forth in section three (3) of this ordinance; and in case such fills or crossings may in any manner obstruct the free passage of water on its way to the river, good and sufficient stone sluices shall be built under said railroad at proper distances, to carry away such water; and in case of damage to private property arising from making such fills for approaches, or on account of any change of grade being made necessary, the owners of said road shall be liable therefor, as provided in section four (4) of this ordinance.

Provided, That the said railroad track between the old railroad bridge and Farnam street shall be at least seventy feet south of the north line of said Davenport and Le Claire road or Front street; and between Brady and Ripley streets the track shall be at least eighty feet from the north line of said Front street, and from thence to Warren street, such a distance as the council may hereafter determine.

Provided, also, that the said road shall be entitled to build such necessary switches and side tracks to such warehouses, mills, and manufactories as the said railroad company desire to reach, when the owners have previously obtained the consent of the council to the use of such facilities; and also the right to construct side tracks to the steamboat landing between Harrison and Perry streets, and there is also hereby granted to the said owners of said railroad the right to construct the necessary turn-outs and side tracks at their passenger, freight and other depots, and to maintain the said tracks forever thereafter for the passage of locomotives propelled by steam, and cars and trains of cars, on the conditions and terms hereinafter specified.

Provided, also That the city expressly reserves the right to grant similar rights and privileges to other railroads; and when such grant is made by the city council to any other railroad or company along the river bank or streets, or levees herein named, then such railroad or company shall have the right to use the track of said Davenport and St. Paul Railroad through the said city for the passage of cars and trains of cars, upon adequate compensation being made therefor, and upon reasonable terms to be agreed upon by the owners of said roads; and in case of a disagreement, then the matters in difference are to be determined by three arbitrators—one to be chosen by each of said owners, and the third by the city council.

Provided, That when such privileges are granted to another rail oad or company, the owners of the railroad herein named shall have
165 the right, and the privilege is hereby granted to it, or them, to construct an additional track adjacent to and immediately south of the line of the track herein named, to be in every way constructed on the terms and conditions as herein provided for the first line, and to be subject to like use by other companies, or the city council may grant such right to another company to construct such track.

Provided, That said tracks of said railroads must cross Spring street so as to leave a space or span of at least sixty feet for a public road or highway at a height of not less than fourteen feet in the clear above the established grade of said road or highway.

SEC. 2. That the owners of the said railroad shall procure, at their own cost and expense, a conveyance to said city of Davenport, for the purpose of a public street or highway, forever, of so much real estate on the north line and adjacent to said Davenport and LeClaire road or Front street as is included in the following description, to wit: Commencing on the west line of Spring street, one hundred and twenty (120) feet north of the north line of the said Davenport and LeClaire road or Front street; thence southwesterly to the west line of D. N. Richard-

son's land forty-four (44) feet north of the north line of said Davenport and LeClaire road or Front street; thence running southwesterly to the west line of Nathaniel Squires' property, forty (40) feet north of the north line of said Davenport and Le Claire road, or Front street; thence continuing southwesterly through Brabrook's land to a point where the north line of said Front street, running through Fulton's addition, intersects the township line between ranges three and four (3 and 4) east of the fifth P. M., being all the real estate lying between the foregoing described line and the Davenport and Le Claire road, or Front street. It being the intention herein to require the owners of said railroad to widen said highway at the north side thereof and between the points aforesaid, at the expense of said railroad, or owners thereof, and without cost or expense to the city, so as to have the north line of said highway when so widened as far from the outer edge of the north embankment of said railroad track as the present width of said highway, thereby leaving said highway at least sixty (60) feet in width, and to furnish said newly built road or street with macadam, in the manner and to the extent that the corresponding portion of the present road or street is now macadamized; and also to build a sidewalk equal to the present sidewalk, and to provide all proper and necessary sluice-ways under the track of said road for carrying away the water from above its line; and the said track of said railroad shall not be laid on said Front street at or within the points aforesaid, until said conveyance or conveyances shall be executed and recorded, and said real estate fully dedicated
166 or set apart to the public as and for a highway, and graded, improved, and put in good condition for travel as a street, and as such accepted by the city.

SEC. 3. If it shall become necessary for the owners of said railroad to carry the track across said Davenport and Le Claire road or Front street, which right is herein granted at said point near said old railroad bridge, above the present grade or surface of said road in order to connect the track of said railroad with the government bridge, it shall, it that event, become the duty of said owners to fill up and raise said Davenport and Le Claire road or Front street, throughout its entire width, from the point where the said track crosses said Front street, each way, on both sides, to such a distance from said crossing that the grade or surface of said Front street shall not exceed one and one-half (1 1-2) feet in one hundred (100) feet, and shall macadamize the same as far as said fill in said Front streete xtends, to the depth of at least twelve (12) inches over the entire surface of said street, and shall also fill up and raise Fourth street from its intersection with said Front street near said old railroad bridge to Dupage street, so as to leave the entire surface of said street uniform between said points, and shall forever keep the said track so passing to the government bridge thoroughly planked between its rails, and on the outside of its rails to the ends of the ties on either side, at all points where there are public highways crossing said track. And the said owners of said road shall also fill up and macadamize with at least one foot of macadam between the track of said railroad and the Mississippi River, all along the levee already constructed by the city of Davenport in front of said track, so as to make the said levee easily accessible for teams and wagons to and from said levee across railroad track, and shall from time to time, as ordered by the city council, wherever said track occupies any portion of the levee now or hereafter improved, or occupies or crosses any street or alley, thoroughly plank the track of said railroad as well as the ties on the outside of said rails.

All to be done at such points and places as the council may direct,

and in such complete and serviceable manner as that all sorts of vehicles can pass over said track without impediment, and shall be liable for all damages caused by a failure so to do; and in addition thereto, if said owners shall fail upon being notified so to do, the city shall have the right to make such improvements and recover the cost and expense thereof from the said railroad or owners by suit at law.

SEC. 4. And the said owners of said railroad shall be liable to the city of Davenport for all damages occasioned by their use of the streets, or any other real property, or changes of grade herein authorized, whether such damages are sustained by property owners or other persons; and said liability to said city of Davenport shall be the same in all respects, and to the same extent as the said city of Davenport shall or may become liable to any third parties, from such use of said streets, alleys,
167 levees, or other real property. And it is herein and hereby agreed and understood that the city of Davenport grants by this ordinance no rights, titles, or privileges that are not at this time absolutely and unquestionably in its lawful possession.

SEC. 5. The said owners of said railroad shall be liable to the Davenport City Railroad Company for all damages sustained by said latter company in consequence of the construction of said railroad across or along said Davenport and Le Claire road or Front street, and the filling up of said street, and operating said railroad; and the said owners of said railroad shall at their own cost and expense replace the track of the said Davenport City Railway Company, and shall construct said track of said railroad in such a way so as to leave a passage for the tracks of said street railway under said railroad between the east line of Spring street and the west line of Brabrook's property, in as good condition as it now is, whenever requested to be removed, and shall indemnify and keep the city of Davenport harmless and free from all costs and damages for which the city of Davenport may or shall become liable to the said Davenport City Railway Company in consequence of the use of said Front street by said railroad as is, or may be, authorized by this ordinance or the ordinance passed and approved May 11, 1870.

SEC. 6. While the right to use said Front street and other streets is absolutely granted, yet this right must be exercised under the supervision of the city council or a committee appointed by it, and the desires and wishes of the city as to what part of the street or bank of the river shall be used for the laying down of the tracks, &c. (except where the line of said track is definitely described in this ordinance), shall be adopted and conformed to by the owners of said railroad.

SEC. 7. The rights and privileges shall vest in the owners of said railroad, upon said owners, for themselves, assignees or successors, filing with the clerk of the city a written acceptance of all the provisions, terms and conditions of this ordinance, as well as of the ordinance of May 11, 1870, being chapter 47 of the Revised Ordinances; and it is expressly understood and agreed that, if said road is not fully completed as far west as the old railroad bridge by the first day of December, 1876, and the balance thereof by June 1st, 1877, that the city reserves the right to repeal this ordinance as well as said chapter 47 of the Revised Ordinances at pleasure.

SEC. 8. In consideration of the privileges and rights granted by this ordinance, the owners of said road agree with the city of Davenport to observe the following conditions and terms on its part:

1st. That as to rate of speed, conduct of trains, etc., they will be subject to the police and legislative powers of the city of Davenport, pro-

vided that no discrimination is made between this and other railroad companies.

2d. That they will at all times keep the portions of the streets they use in good condition and repair, and in no case allow the rails
168 to be above the level of the street, or in any way to prevent the free passage of teams over or on said track, and during the building of said railroad the builders shall not be permitted to advance its line for more than one thousand (1,000) feet, unless otherwise ordered by the city council, or a committee by the council appointed, until the one thousand feet first preceding thereto shall have been completed, in all respects, as fully as provided for in and by this ordinance.

3d. The railroad company, except in case of accident or unavoidable necessity, shall not leave their cars or trains standing on the street so as to obstruct said crossings, and shall at every crossing erect a sign, upon which shall be painted, in large letters, "Railroad Crossing," and provide a flagman when requested to do so by resolution of the city council.

4th. The rights herein conferred upon the said company are granted upon the explicit understanding that the said company will faithfully observe the foregoing conditions, and will at all times, and in good faith, to the extent of its power, afford adequate facilities to the business men of Davenport for the prompt transaction of business, and will, in all things, and at all times, deal and act justly toward said city and the citizens thereof.

SEC. 9. The city will lease, on reasonable terms, to said company, a suitable portion of its levee, to be determined between the city council and the railroad company, for station and depot buildings; said terms to be agreed upon by the city council and the said company. If the parties hereto cannot agree, then each will select an arbitrator, and the two a third, whose award shall be final.

SEC. 10. That while the city council has now the right and power to repeal chapter 47 of the revised ordinances of 1875, being an ordinance entitled an ordinance granting the right of way and certain privileges and rights to the Davenport and St. Paul Railroad Company, passed May 11, 1870, by reason of the failure of said company to have its road in "actual operation in the city" within five years from the passage of said ordinance, it does not avail itself of such right further than to repeal so much of said ordinance as conflicts with the provisions hereof: Provided, That if the said railroad is not completed within the time and manner required by section 8 hereof, the council shall have the right to repeal the same at pleasure.

SEC. 11. That chapter 48 of the revised ordinances of 1875, being an ordinance entitled an ordinance designating and defining the line of the right of way granted to the Davenport and St. Paul Railroad Company, etc., passed and approved July 30, 1873, be, and the same is hereby, repealed.

Passed and approved May 26, 1876.

RODERICK ROSE, *Mayor.*

Attest:

J. G. TUERK, *City Clerk.*

169 Exhibit Q (see p. 119) is patent of the United States to Antoine Le Claire, recorded in 1858, including this and other land, the description in which is: Beginning on the right or northwest bank of the Mississippi River, at a stone mound, the northwest corner of this boundary; thence with the meandering of the river, north 71 degrees

30 minutes, east 14 chains and 50 links; north 71 degrees 30 minutes, east 29 chains; north 53 degrees, east 41 chains; north 73 degrees, east 5 chains 45 links to a stone mound, the southeast corner of this tract; thence north 57 chains 14 links to a post-corner from which a burr oak, ten inches in diameter, bears north 39 degrees west, distant 132 links to white oak, 32 inches in diameter, bears south 23 degrees west, distant 149 links; thence west 80 chains to a mound in the prairie corner; thence north 93 chains and 64 links to place of beginning.

170 And afterwards, to wit: On the 10th day of October, A. D. 1878, appears the following record entry, in words and figures as follows, to wit:

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT & NORTHWESTERN RAILROAD Co., appellant.

Appeal from Scott circuit court.

On this day this cause is submitted to the court on printed argument of counsel.

And afterwards, on the 6th day of December, A. D. 1878, appears the following record entry, to wit:

171 RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT & NORTHWESTERN RAILROAD Co., appellant.

Appeal from Scott circuit court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the circuit court. It is therefore considered by the court that the judgment of the court below be, and it hereby is, affirmed, and that a writ of procedendo issue accordingly. It is further considered by the court that the appellant pay the costs of this appeal, taxed at $, and that execution issue therefor.

172 And afterwards, to wit, on the 20th day of December, A. D. 1878, there was filed in the office of the clerk of the supreme court of Iowa a petition for writ of error, in words and figures as follows, to wit:

In the supreme court of the State of Iowa.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT & NORTHWESTERN RAILway Company.

Appeal from Scott County.

Now comes the Davenport & Northwestern Railway Company and prays for a writ of error and a supersedeas in the above-entitled cause

from the judgment of the said supreme court to the Supreme Court of the United States, and assigns for error:

173 1. That in the trial of said cause there was drawn in question the validity of a statute or authority exercised under the laws of the United States, and the decision was against their validity.

2. That the plaintiff in error claimed a right under the Constitution and laws of the United States, and the decision was against their validity. Dec. 16, 1878.

GRANT & GRANT,
BILLS & BLOCK,
For Pl'tff in error, D. & N. W. R'y. Co.

This writ of error is allowed on filing a supersedeas bond with sureties to be approved by the chief justice of the supreme court of the State of Iowa.

JAS. H. ROTHROCK,
Ch. J. Supreme Court of Iowa.

DEC. 19th, 1878.

174 And on the same day, to wit, on the 20th day of December, 1878, there was filed in said office a supersedeas bond, in words and figures as follows, to wit:

In the supreme court of the State of Iowa.

RENWICK, SHAW & CROSSETT
vs.
THE DAVENPORT & NORTHWESTERN RAILway Company.

Know all men by these presents that we, the Davenport & Northwestern Railway Company, as principal, and John E. Henry, Thos. Scott, and T. T. Dow, as sureties, are held and firmly bound unto Renwick, Shaw & Crossett in the penal sum of one thousand dollars, to which payment well and truly to be made, we bind ourselves and each of us.

175 Given under our hands and seal this 16th day of December, 1878.

The conditions of this obligation is this: Whereas said Davenport & Northwestern Railway Company have sued out a writ of error to the Supreme Court of the United States from a judgment of the supreme court of the State of Iowa in a case therein pending, wherein said Davenport & Northwestern Railway Company are appellants and said Renwick, Shaw & Crossett appellees, in favor of said appellees and against said Davenport & Northwestern Railway Company, shall prosecute their writ of error to effect, and if they fail to make good their plea, shall pay all damages and costs that may be adjudged against them, this obligation to be void, otherwise to remain in full force and effect.

176 JOHN E. HENRY.
THOS. SCOTT.
T. T. DOW.

We hereby certify that we are residents and citizens of the State of Iowa; that we are worth double the amount herein entered to be secured beyond the amount of our debts, and have property liable to execution equal to the sum herein secured.

JOHN E. HENRY.
THOS. SCOTT.
T. T. DOW.

Subscribed and sworn to by John E. Henry, Thos. Scott, and T. T. Dow this 15th day of December, A. D. 1878.

[SEAL.] C. WHITAKER,
Notary Public Scott Co., Iowa.

The above bond is hereby approved this 19th day of December, 1878.

JAS. H. ROTHROCK,
Ch. J. Sup. Court of Iowa.

177 Also appears the following original writ of error, filed December 20th, 1878.

178 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between The Davenport & Northwestern Railway Company, a plaintiff in error, and Renwick, Shaw & Crosset, defendants, a manifest error hath happened, to the great damage of the said Davenport & Northwestern Railway Company, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceeding aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 18 day of December, A. D. 1878.

[SEAL.] EDWARD R. MASON,
Clerk U. S. C. C. District of Iowa.

Allowed & made a supersedeas on filing bond approved by me this 19th day of Dec., 1878.

JAS. H. ROTHROCK,
Ch. J. Sup. Court of Iowa.

(Indorsed:) Filed Dec. 20th, 1878. E. J. Holmes, c'k s. c.

179 And on the 22 day of December, 1878, the following citation with acceptance of service was filed in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Renwick, Shaw and Crossett:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, wherein The Davenport & North-

western Railway Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in
180 error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James H. Rothrock, ch. justice of sup. court of Iowa, this 19th day of Dec., 1878.

JAS. H. ROTHROCK, *Ch. J.*

Service accepted by us this 21st day of December, A. D. 1878.

PUTNAM & ROGERS,
DAVISON & LANE,
Attys. for Renwick, Shaw & Crossett.

181 Supreme court of Iowa.

I, E. J. Holmes, clerk of the supreme court of Iowa, hereby certify the foregoing to be a true, full, and complete copy of the abstract of record upon which the foregoing entitled cause was heard in the supreme court; the record entries, the petition for writ of error, the supersedeas bond, the citation with acceptance of service thereon, and the original writ of error, as true, full, and complete as they remain on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme court of Iowa, at my office, at the capital of Iowa, the 12th day of Feb'y, 1879.

[SEAL.]

E. J. HOLMES,
Clk. Sup. Court.

(Indorsement on cover:) No. 843. The Davenport and Northwestern Railway Company, pl'ff in error, vs. Renwick, Shaw & Crossett. Iowa sup. court. Filed 23d September, 1879.

OFFICE SUPREME COURT U. S.
FILED
MAR 9 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

THE DAVENPORT & NORTHWESTERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

RENWICK, SHAW & CROSSETT, *Defendants in Error*.

No. 843,

ERROR TO THE SUPREME COURT OF IOWA.

Motion to Dismiss or Affirm,

BY

JAMES T. LANE AND JOHN N. ROGERS,
Counsel for Defendants in Error.

FILED , 18 .

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

THE DAVENPORT & NORTHWESTERN RAILROAD COMPANY,
Plaintiff in Error,
vs.
RENWICK, SHAW & CROSSETT,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF IOWA.

MOTION TO DISMISS OR AFFIRM.

Now come the defendants in error, by their attorneys, and move the Court to dismiss the writ of error herein, because this Court has no jurisdiction to review or reverse the judgment of the Supreme Court of Iowa herein, as appears from the record.

And said defendants in error further move the Court, in case the writ of error shall not be dismissed for want of jurisdiction, that the judgment of the Supreme Court of Iowa herein be affirmed, because it is manifest from the record that the writ of error was taken for delay only, and that the question in which the jurisdiction of this Court depends is so frivolous as not to need further argument.

JAMES T. LANE, AND
JOHN N. ROGERS,
Counsel for Defendants in Error.

BRIEF IN SUPPORT OF MOTION.

The proceedings brought up for review by this writ of error were commenced by the Railroad Company in September, 1876, under the statutes of Iowa regulating the exercise of the right of eminent domain for the construction of railways, to have the damages ascertained which would be sustained by the defendants in error, as riparian owners, by the construction of the railroad along the shore of the Mississippi River, *between high and*

Record p. 1-3.

low water mark, in front of certain land in the City of Davenport, Iowa, bounded on the river, and occupied by the defendants in error for the purposes of a steam saw mill and appurtenances, for manufacturing lumber from logs floated down the river to said mill.

An appeal was taken from the award of the six freeholders summoned by the sheriff, to the State Circuit Court for Scott County, where the appeal was tried by a jury and a verdict rendered fixing the damages to be paid to the defendants at $5,000. Judgment being rendered accordingly, the Railroad Company appealed to the Supreme Court of Iowa, where the judgment below was affirmed.✗ Upon this affirmance, the Railroad Company brings error to this Court.

Rec. p. 62. " " 63, " " 89.

It is settled by judicial decisions in Iowa, that the title of riparian owners on the Mississippi River extends only to ordinary high water mark; the title to the soil below that line being in the State.

McManus *vs.* Carmichael, 3 Iowa, 1.
Tomlin *vs.* D. B. & M. R. R. Co., 32 Iowa, 106.

In Tomlin's case, just cited, the Iowa Supreme Court decided (in 1871) that a riparian owner on the river was not entitled, as the law then stood, to damages for having access from his land to the river cut off by the construction of a railroad in front of such land, between high and low water marks.

After this decision, the Iowa Legislature, in 1874, enacted the following statute (Public Laws of Iowa, 1874, Chap. 35, p. 28):

"AN ACT in relation to Riparian Owners on the Mississippi and Missouri Rivers.

"SECTION 1. *Be it Enacted, &c.* That all owners or lessees of lands, or lots, situated upon the Iowa banks of the Mississippi and Missouri rivers, upon which property there is now, or may hereafter be, carried on any business which is in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, are hereby authorized to construct and maintain, in front of their said property, piers, cribs, booms, and other proper and convenient erections and devices for the use of their respective pursuits, and the protection and harbor of rafts, logs, floats, and other water crafts: *Provided*, That the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

✗ Reported 49 Iowa, 664.

"SEC. 2. It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury or damage to such owners occasioned thereby shall be first ascertained and compensated, in the manner provided by Chap. 4, Title 10, of the Code.

"Approved March 18th, 1374."

The proceedings in this case were commenced and prosecuted under the authority of the second section of this act, there being no other law of the State providing for the assessment of damages in such a case; and conform as to manner and course of proceeding to the chapter of the Code referred to in said section, being the statute regulating the mode of acquiring the right of way for railways over private property, and of ascertaining the damages to be paid therefor.

It was insisted on behalf of the Railroad Company, in the courts below, that the Iowa statute of 1874, quoted *supra*, was *void*, as conflicting with the act of Congress of March 3d, 1873, (U. S. Rev. Stats., Sec. 5254), which is as follows:

"The owners of saw mills on the Mississippi river are authorized and empowered, under the direction of the Secretary of War, to construct piers or cribs in front of their mill property on the banks of the river, for the protection of their mills and rafts against damage by floods and ice: *Provided, however*, that the piers and cribs so constructed shall not interfere with or obstruct the navigation of the river. And in case any pier or crib, constructed under the authority of this section, shall at any time, or for any cause, be found to obstruct the navigation of the river, the Government expressly reserves the right to remove or direct the removal of it, at the cost and expense of the owners thereof."

It was claimed that Congress, under the Constitution, is invested with power to regulate the subject of erecting piers, cribs, &c., on navigable rivers; and having exercised the power as to the Mississippi river, by the act just quoted, any state legislation on the same subject is unauthorized and void; that therefore the Iowa act of 1874 was invalid, and the defendants in error were in consequence thereof entitled to *no damages whatever* for being cut off from the river by the construction of the railroad in front of their property; they having no such right independent of the statute, as held in Tomlin's case, 32 Io. 106.

Rec. p. 73; p. (at foot) — 79, par. 1, 2, 3, 8.

Instructions to the jury to that effect were asked on the trial and refused; on which refusal error was assigned in the Supreme Court. That Court, as already stated, affirmed the ruling below.

The ground, therefore, and the only one, on which jurisdiction in error is claimed for this Court is, that there is drawn in question the validity of the Iowa act of 1874, on the ground of its being repugnant to the Constitution of the United States, and that the decision of the State Court was in favor of its validity.

But it is submitted that the case does not raise any question as to the *invalidity* of the State statute or any part thereof, by reason of its conflict with the act of Congress; and that no such question was decided by the Court below. On the contrary it will appear, on looking into the matter, that in order to *lay a foundation* for their proposed assault on the validity of the act, it was necessary for the counsel for the Railroad Company to maintain a particular *construction of its terms*, which construction the Court below held not to be maintainable; and hence no question arose for determination as to the conflict of any part of the Iowa act with the act of Congress, and no such question was in fact decided. In other words, the question was upon the *interpretation* of the act, there being no dispute nor room for dispute of its validity, if interpreted according to the view taken by the Court below.

For it is plain at the first glance, that the case depends on the *second* section of the Iowa statute, and not at all on the first. It is equally clear that the objection of the plaintiff to the validity of the act, as above stated, applies only to the *first* section, and has no bearing whatever on the second section, considered separately. The first section gives to riparian owners the right to build piers, cribs, etc., on the river in front of their premises. The second ~~section~~ is occupied with a perfectly distinct matter, viz: the right of riparian proprietors to be compensated for being excluded from access to the river, by the building of a railroad between their land and the stream; a matter within the exclusive domain of State legislation, and to which the act of Congress has no relevancy. Unless a dependence of the second section upon the first can be shown, so close and absolute that the invalidity of the first section will involve the invalidity of the second, no ground whatever is or can be suggested for questioning the validity of the latter section.

Accordingly, the Railroad Company were driven to contend in the Court below, that by the true interpretation of the second section, the right to compensation therein conferred is conferred upon such riparian owners only as have actually availed themselves of the privilege which the first section purports to grant, of building piers, cribs or the like structures, in the river in front of their land; and that compensation is intended to be given only for the destruction of, or interference with, these structures by the building of the railroad.

Hence it was argued that the rights conferred by the second section were so dependent upon those conferred by the first, that if the first section be invalid by reason of the act of Congress, the second must share its fate.

This interpretation of the act finds no color of support in its language; and (what is still more to the point) it was explicitly rejected by the Court below, which held the two sections to confer entirely independent rights. (See their opinion in the record hereto annexed.) Their decision upon the interpretation of the act, it is needless to say, is not reviewable here. No basis having therefore been laid for raising the question of the supposed conflict between the first section of the Iowa statute and the act of Congress, the Court below expressed no opinion upon that question; much less did they base their judgment upon its decision. As there is not and cannot be claimed to be any objection to the validity of the second section of the act, separately considered, and this Court must take the statute to mean what the State Court has held it to mean, there is no question in the case for this Court to decide as to conflict between the two statutes, no such question having been decided in the State Court. The necessary result, we submit, is that this Court has no jurisdiction of the cause.

Independent of this view of the case, the Railroad Company are in no situation to attack the validity of the second section on any ground.

That section not only furnishes the sole legal foundation for the commencement and prosecution of these very proceedings, (begun and carried on, as already stated, by the Railroad Company itself,) but is also the only source of their right to locate and construct their road *at all*, between high and low water mark, along the Mississippi River. There is no other statute from which such a right can be derived, as is shown in the opinion of the State Court.

The company having commenced these proceedings under the statute for the express purpose of having the damages of the riparian owners ascertained,—a proceeding which would be an utter nullity if the statute be of no validity,—cannot be allowed to take the ground that the act is null and void, and the owners therefore entitled to no damages. On the contrary, they are estopped from taking any such position, which would amount to a complete *felo de se*. This has been distinctly held by the Supreme Court of Illinois, in a recent and similar case:

Met. City R. R. Co. *vs.* Chicago &c. R'y Co., 87 Ill., 317, 322, 328.

And though the decision in this case may not have been placed upon that ground in the opinion of the State Court, it is perfectly capable of being thus supported; which shows that the record does not necessarily raise any question reviewable in this Court.

We understand the rule to be, that to give jurisdiction to this Court, it must appear from the record that the judgment of the State Court *could not* have been rendered without a decision of the federal question.

Gibson *vs.* Chouteau, 8 Wall. 314.
Furman *vs.* Nichol, *ib.* 44.

If, however, it shall be insisted that there is, technically, *jurisdiction* of the case, because it was claimed in the court below that the whole of the State statute was void, and this position was overruled, it is clear that jurisdiction based upon that ground merely, if it exists at all, is the merest technicality; there being no real or substantial question raised upon the validity of the second section, if interpreted as the State court interprets it, as conferring a right independent of the first section. Regarded in that light, the jurisdictional question is palpably *frivolous*, and for that reason the judgment should be summarily affirmed.

Although the railroad was actually built in 1876 between the property of the defendants and the river, and has been in operation ever since, our clients have been hitherto kept out of the compensation to which they are entitled for an injury long since consummated, and are still kept out of it by this groundless appeal. We trust that the Court will see its way clear to giving them speedy relief upon this motion.

JAMES T. LANE AND
JOHN N. ROGERS,
Counsel for Defendants in Error.

OPINION OF SUPREME COURT OF IOWA.

At the time of preparing our argument, we were not aware that the record did not contain the opinion of the Supreme Court of Iowa in this case, as we have since learned from a printed copy of the record, just received, and we therefore have caused a printed copy of said opinion to be attached hereto, which will be found reported in 49th Iowa Reports, just published, page 664.

JAMES T. LANE AND
JOHN N. ROGERS,
Counsel for Defendants in Error.

SUPREME COURT—DECEMBER TERM, 1878.

RENWICK, SHAW & CROSSETT,
vs.
THE DAVENPORT & NORTHWESTERN R. W. CO., *Appellant.*

APPEAL FROM SCOTT CIRCUIT COURT.

This proceeding was commenced by the appellant filing with the Sheriff of Scott County a petition for the appointment of free-holders to assess the damages caused by the location and construction of appellant's railway along the bank of the Mississippi river, between high and low water mark, in front of certain premises occupied by the appellees as lessees. From the assessment by the sheriff's jury, both parties appealed to the Circuit Court, where there was

a jury trial and judgment for the plaintiffs. The defendant alone appeals.

GRANT & GRANT AND
BILLS & BLOCK,
For Appellants.

DAVISON & LANE AND
PUTNAM & ROGERS,
For Appellees.

SEEVERS, *J.*

The plaintiffs are the lessees of a certain parcel of land within the corporate limits of the city of Davenport, having a river front of about 1300 feet, and extending back about 900 feet, on which is situate a steam saw mill, planing mill, lumber yard, houses, &c. The said premises are used exclusively for the manufacturing and selling lumber, or rather the plaintiffs so claim. Logs are obtained by being floated down the river and landed in front of or convenient to the saw mill. The plaintiffs, or those under whom they claim, have gradually from year to year made an embankment from a projection in the shore into the river, at the outer end of which there has been erected a stone crib or pier. The embankment between the crib and natural shore was made principally with the refuse of the mill, but it is firm and solid. Across this embankment the railway was constructed.

The council of the city of Davenport, under certain conditions prescribed in an ordinance, authorized the construction of the railway where the same was located.

On March 3, 1873, Congress passed the following Act:

" The owners of saw-mills on the Mississippi river are " authorized and empowered, under the direction of the " Secretary of War, to construct piers or cribs in front of

" their mill property on the banks of the Mississippi river " for the protection of their mills and rafts against damage " by floods and ice: *Provided*, That the piers or cribs so " constructed do not interfere with or obstruct the naviga- " tion of the river; and in case any pier or crib constructed " under authority of this section, shall at any time, and " for any cause, be found to obstruct the navigation of the " river the Government reserves the right to remove or direct " the removal of it, at the cost and expense of the owners " thereof.

(Revised Statutes of U. S., § 5254.)

It is conceded that the consent of the Secretary of War was not obtained for the erection of the embankment and crib in question.

In 1874, the General Assembly of this State passed the following Act:

" 1. That all owners and lessees of lands or lots, situ- " ate on the Iowa banks of the Mississippi and Missouri " rivers, upon which property there now is, or hereafter " may be, carried on any business in any way connected " with the navigation of the rivers, or to which said naviga- " tion is a proper or convenient adjunct, are hereby author- " ized to construct and maintain, in front of their said " property, (*such*) piers, cribs, booms, and other proper and " convenient erections and devices for the use of their res- " pective pursuits and the protection and harbor of rafts, " logs, floats, and other water-crafts: *Provided*, That the " same present no material or unreasonable obstruction to " the navigation of the stream, or to a similar use of ad- " joining property.

" 2. It shall not be lawful for any person or cor- " poration to construct or operate any railroad or other

" obstruction between such lots or lands and either of " said rivers, or upon the shore or margin thereof, unless " the injury and damage to such owners occasioned thereby " shall be first ascertained and compensated in the manner " provided by Chap. 4, title 10 of the Code.

(Public Laws of 15th G. A., 28.)

(The important and material questions discussed by counsel are: 1. That Congress has exclusive jurisdiction over the navigable waters of the United States, and having exercised it by providing that cribs or piers may be erected on certain conditions by owners of saw-mills on the Mississippi river in front of their property, that the aforesaid Act of the General Assembly is absolutely void, or rather that the plaintiffs are not entitled to damages thereunder. 2. That the railway having been properly constructed and in accordance with the ordinance of the city of Davenport, the plaintiffs therefore are not entitled to damages; and 3, that the rule for the assessment of damages given the jury is erroneous. Growing out of these general propositions are certain incidental questions, based on the instructions given or those refused, and the admission or rejection of evidence. It is also claimed that the damages assessed are excessive. These several questions will be considered to such an extent as is deemed proper and essential.)

I.

For the purposes of this case, it will be conceded that Congress, under the power to regulate commerce, has exclusive jurisdiction over the Mississippi river, and having exercised such power, all State legislation in conflict therewith is void.

This brings us at once to a consideration and construc-

tion of the legislation of the State which is claimed to be in conflict with that of Congress.

We shall not stop to consider whether the first section of the Act of the General Assembly of 1874, in so far as it authorizes the erection of cribs or piers, is in conflict with the Act of Congress or not, but will concede it to be so.

It does not follow that therefore the second section is void and the plaintiffs not entitled to damages thereunder. The two sections are separate and distinct, and embrace different subjects. One therefore may stand, although the other is unconstitutional and void.

It is insisted the second section only refers to and embraces the property described in the first, and that unless a riparian owner has availed himself of the benefits of the first section, he is not entitled to damages under second, or because of the fact that he has availed himself of the benefits of the first, he is not entitled to damages under the second section.

We cannot concur in these propositions, and believe them to be unsound.

We have no occasion to determine whether a riparian owner who is not engaged in any business connected with the navigation of the river can recover damages because of the location of a railway as in the case at bar. But we do not believe that when one is engaged in such business, it is essential to his recovery that he should have erected a crib or pier in front of his property. Such an invidious distinction between riparian owners engaged in business connected with the navigation of the river should not be indulged. Nor should such construction of the statute be tolerated, unless it is required by the positive and express

words of the statute, or appears therefrom by necessary and unmistakable implication.

So far from this appearing, the clear intent of the statute is to place all riparian owners on the same footing. The damages accrue under the statute to the lots and land and business done thereon connected with the navigation of the river by reason of the construction of the railway, and not because a crib or pier has been erected in front of the premises.

The reference to such "lots or lands" in the second section of the statute does not mean only such "lots or lands" mentioned in the first section, in front of which cribs or piers have been constructed, but to such lots or lands as are "situate on the Iowa banks of the Mississippi and "Missouri rivers, upon which property there now is or "hereafter may be carried on any business in any way "connected with the navigation of the river." It must be true, or at least may be, that a riparian owner may carry on a business connected with the navigation of either of said rivers without the erection of any crib or pier. Such an owner, under the statute, is as much entitled to damages as one who has or may hereafter make such erections.

We conclude, therefore, that the second section of the Act of the General Assembly of this State, above quoted, is not void because in conflict with the Act of Congress.

II.

In McManus *vs.* Carmichael, 3 Iowa, 1, it was held that the bed of the Mississippi river extends to high water mark, and in Tomlin *vs.* D. B. & M. R. R. Co., 32 ib. 106, it was held that a riparian owner was not entitled to damages because of the construction of a railway in front of his premises between high and low water mark.

These cases recognize the doctrine that the title to the soil between high and low water is vested in the State, and not in the United States, and such is the well-settled rule.

Martin *vs.* Waddell, 16 Pet., 367.
Den *vs.* Jersey Company, 15 How, 426.
Pollard *vs.* Hagan, 3 How, 212.

When the Tomlin case was determined, § 1328 of the Rev. was in force, which provided that any railroad corporation might use, occupy and enjoy "any lands of the State," without payment of damages, to an extent necessary and convenient for the purposes of the corporation. The theory of that decision is, that the State, as the owner of the soil between high and low water, had granted the defendant the right to construct its railway thereon without the payment of damages: that the plaintiff was not entitled to recover because thereby he had been deprived of the free and convenient access to the river.

Section 1328 of the Rev. has been repealed, and in its place the statute of 1874 has been enacted. The rule of the Tomlin case is therefore no longer applicable.

The State being the owner of the soil, the defendant was not entitled to construct its railway thereon without the consent of the State. In the absence of such consent, the State could have enjoined the construction of the railway. The right to construct the road has been granted on condition that the defendant shall indemnify the riparian owner. Without doubt, we think the State had the power not only to grant the right, but annex thereto the condition mentioned.

The defendant has availed itself of the privilege granted but in substance says the conditions are invalid. That is to say, the argument is the State had the power to make the grant, but not the power to annex the condition in question.

In this we do not concur, but think whenever the unrestricted power to grant any given thing or right exists, and the power is exercised, the grantor may annex any conditions thereto he sees proper, and that any one accepting the benefits cannot be permitted to repudiate the conditions and burdens imposed by the grantor.

III.

While it is not entirely clear, yet we incline to think the defendant, in certain instructions which were refused, requested the Court to charge that plaintiffs were not entitled to recover because the railway was located across the fill or embankment which extended into the river and terminated at the crib.

In Atlee *vs.* Packet Co., 21 Wall., 389, the pier was erected without authority, and being an obstruction to navigation, it was held damages might be recovered by the owner of a barge which collided therewith.

The case at bar is different in several respects, even if it be conceded that the crib is unlawful and constitutes an obstruction to navigation, prominent among which is, that the defendant is not seeking to recover damages caused by the erection of the crib. In no respect has the defendant been damaged thereby.

But the right of a riparian owner to erect wharves, piers and similar structures, provided the same does not obstruct navigation, has been affirmed in several adjudicated cases. Musser *vs.* Hershey, 42 Iowa, 356, and cases there cited.

If the crib is an unlawful structure, it by no means follows the embankment is, at the place where it is crossed by the railway, between high and low water. If it is, then the

railway is also. It will be assumed therefore that the portion of the embankment within the right of way does not constitute an obstruction to navigation. It was therefore property because it was lawfully constructed and the defendant cannot take and appropriate the same to its own own use without compensating the plaintiffs therefor. There is nothing in the Tomlin case that conflicts with this view. All that the plaintiff claimed in that case to be deprived of by the construction of the railway was that his free access to the river was cut off. His property was in no respect interfered with.

(It is not claimed that the defendant was in any respect injured or damaged by the erection of the embankment, or that it formed an obstruction to defendant's navigation of the river. In fact, it is clear it did not desire to do so, but desires to take and appropriate the plaintiffs' property because it interferes with some one's rights who does not see proper to complain.

The undertaking of the defendant for the protection of others is larger than it has authority to assume. There was no error in the refusal to instruct in this respect, as asked by the defendant.

For the reasons heretofore stated, there was no error in refusing instructions three, four and seven, asked by the defendant.

IV.

Can the authority granted by the city of Davenport to construct the railway have the effect to prevent the plaintiffs from recovering damages ?

A solution of this question depends on the extent of the powers granted in the charter of the city by the General As-

sembly. The only power granted in this respect we have been able to discover is "to improve and preserve the nav- "igation of the Mississippi river within the limits of the "city." Art. 5, § 2, city charter, Laws of 1851, 117.

It is somewhat difficult to see how the navigation of the river would be preserved by the construction of a railway along its banks between high and low water. We are not prepared to say that the consent of the city was not essential, but that such consent had the slightest effect on the plaintiff's rights we do not believe. The city had no such power. Previous to the repeal of § 1328 of the Rev., a railway might have been located and constructed over the premises in question subject only to the equitable control of the city. C. N. & S. W. R. R. *vs.* The Mayor of Newton, 36 Iowa, 299. But the ordinance in question was not passed until after the repeal of that section, and the enactment of the law of 1874, which in express terms gave the plaintiffs the right to damages.

V.

The Court in substance charged the jury that in assessing the damages they should consider the entire premises of which the plaintiffs were the lessees, necessarily and properly used by them in their business, although the premises were divided by a street or highway. It is said the planing mill, and perhaps other portions of the property, had no connection with the saw mill, and it was therefore erroneous to direct the jury to take into consideration the whole of the premises. But there was evidence tending to show otherwise. It was therefore a question for the jury whether or not the whole of the premises were "necessarily "and properly" used by the plaintiffs "in their business," and the extent of the damages.

The instruction is not erroneous, however much the action of the jury may be. For the same reason, the objection made to the eighth instruction is not well taken. For the reasons stated, instructions nine and ten, in relation to the rent of dwelling houses on said premises, were properly refused.

It is urged that Fleming *vs.* The Chicago D. & M. R. R. Co., 34 Iowa, 353, is in conflict with this view. This is a mistake. In that case damages were claimed by the owner of the fee, and the lots taken by the right of way were remote from other lots, and he sought to recover damages sustained by reason of his ownership of the latter. The plaintiffs seek to recover damages caused by the location of a railway over a parcel of land through which is a street or highway which they have leased for business purposes. For the purposes of their business the highway may have been an advantage. If their leasehold interest was rendered less valuable by reason of the construction of the railway, the fact that the premises leased were traversed by a street should not be considered in reduction of their damages. The business done and property on both sides thereof should be considered. Beside the defendant sought to have damages assessed for the whole tract.

VI.

The jury were instructed, " nor is the defendant entitled " to have the particular manner in which the road is con- " structed considered in reduction of the damages occa- " sioned by taking the right of way." Why this clause of the ninth instruction is erroneous, counsel have not advised us. No authority is cited or argument made in support of the position of counsel.

It is therefore sufficient to say, as an assessment of

sembly. The only power granted in this respect we have been able to discover is "to improve and preserve the nav- "igation of the Mississippi river within the limits of the "city." Art. 5, § 2, city charter, Laws of 1851, 117.

It is somewhat difficult to see how the navigation of the river would be preserved by the construction of a railway along its banks between high and low water. We are not prepared to say that the consent of the city was not essential, but that such consent had the slightest effect on the plaintiff's rights we do not believe. The city had no such power. Previous to the repeal of § 1328 of the Rev., a railway might have been located and constructed over the premises in question subject only to the equitable control of the city. C. N. & S. W. R. R. *vs.* The Mayor of Newton, 36 Iowa, 299. But the ordinance in question was not passed until after the repeal of that section, and the enactment of the law of 1874, which in express terms gave the plaintiffs the right to damages.

V.

The Court in substance charged the jury that in assessing the damages they should consider the entire premises of which the plaintiffs were the lessees, necessarily and properly used by them in their business, although the premises were divided by a street or highway. It is said the planing mill, and perhaps other portions of the property, had no connection with the saw mill, and it was therefore erroneous to direct the jury to take into consideration the whole of the premises. But there was evidence tending to show otherwise. It was therefore a question for the jury whether or not the whole of the premises were "necessarily "and properly" used by the plaintiffs "in their business," and the extent of the damages.

The instruction is not erroneous, however much the action of the jury may be. For the same reason, the objection made to the eighth instruction is not well taken. For the reasons stated, instructions nine and ten, in relation to the rent of dwelling houses on said premises, were properly refused.

It is urged that Fleming *vs.* The Chicago D. & M. R. R. Co., 34 Iowa, 353, is in conflict with this view. This is a mistake. In that case damages were claimed by the owner of the fee, and the lots taken by the right of way were remote from other lots, and he sought to recover damages sustained by reason of his ownership of the latter. The plaintiffs seek to recover damages caused by the location of a railway over a parcel of land through which is a street or highway which they have leased for business purposes. For the purposes of their business the highway may have been an advantage. If their leasehold interest was rendered less valuable by reason of the construction of the railway, the fact that the premises leased were traversed by a street should not be considered in reduction of their damages. The business done and property on both sides thereof should be considered. Beside the defendant sought to have damages assessed for the whole tract.

VI.

The jury were instructed, " nor is the defendant entitled " to have the particular manner in which the road is con- " structed considered in reduction of the damages occa- " sioned by taking the right of way." Why this clause of the ninth instruction is erroneous, counsel have not advised us. No authority is cited or argument made in support of the position of counsel.

It is therefore sufficient to say, as an assessment of

damages was asked, and in fact made by the Sheriff's jury at the time the road was located, its construction afterward, however well done, could not affect the plaintiffs rights which before that had accrued.

VII.

The petition filed with the Sheriff asked that the right of way, one hundred feet wide, be condemned. The Sheriff's jury reported that they had assessed the damages for that width. The defendant deposited with the Sheriff the amount so assessed and notified the plaintiffs before or pending the appeal they were about to enter on such right of way and construct the railway.

The Court instructed the jury to estimate the damages on the basis that one hundred feet in width was taken. This is claimed to be erroneous because the defendant had filed a paper limiting the right of way to about one half of said width. The abstract shows the Court refused to permit said paper to be filed. Therefore there was no error in the instructions, for the record failed to show the defendant had abandoned its right to have any part of the one hundred feet condemned. The error if any, was in refusing permission to file the paper. This while assigned as error, is not even mentioned in the argument and will therefore be disregarded.

VIII.

In the eleventh and twelfth instructions the defendant asked the Court to instruct the jury in relation to possible and remote damages; they were refused. But the substance thereof was given in the ninth instruction of the charge of the Court, and in the twenty-first instruction

asked by the defendant and given by the Court. There was not therefore any prejudicial error in refusing the eleventh and twelfth instructions asked.

IX.

In the 13th instruction, the defendant requested the Court to say to the jury, "That the true measure of dam-"ages is the difference in the value of the property, before "the road was built in front of it, and after it is built. * " This was refused. It will be readily seen that this instruction is not applicable to the facts. The plaintiffs are not the owners of the fee, and it is the annual use during the term of their lease which the jury were authorized to consider. That is, the value of the annual use of the premises before taking the right of way and what it was worth afterwards. The 8th instruction in the charge of the Court states the proper rule.

X.

It is said: "The Court erred in refusing to allow Golds-"bury, Suiter, Lambert, *et al.*, to testify * * * "because they were not experts." There were two Suiters examined as witnesses, W. M. and John. Which one is referred to, or who the others are than those named, counsel have not informed us. The abstract fails to disclose that any objection was made to the testimony of Goldsbury or John Suiter, or that any portion of their evidence was was excluded. No such objection as the one indicated by counsel was made to the testimony of W. M. Suiter, and no part of his evidence was excluded for the reason above stated.

Lambert was asked, "Tell the jury what was (the) dif-

" ference in value of this property before and after the rail-
" road was built." This was objected to " because the wit-
" ness was not competent to give an opinion and asks him
" to state directly the amount of damage to the property
" instead of asking the value before and after the condem-
" nation." The objections were sustained, and the abstract fails to disclose on which ground. The last one, at least, was well taken, and there was no error in sustaining that objection.

XI.

The jury assessed the plaintiffs' damages at $5,000, which is said to be excessive. The lease had between five and six years to run. The damages assessed therefore amounted to not exceeding $1,000 per year. While the amount allowed was liberal, we are not prepared to say that it indicates either passion or prejudice. We therefore cannot interfere.

XII.

Errors were assigned because of the refusal to give instructions 23 and 24 asked by defendant, and our attention is called thereto for the first time in the reply to the argument of appellees. At the time counsel for appellees prepared their argument they had the right to regard the errors aforesaid as abandoned or waived. It is not intimated that the failure to insist on said errors in the argument in chief was through oversight. Under such circumstances, we would not be warranted in reversing the cause, if in our opinion the instructions should have been given without giving the appellees an opportunity to be heard. But we have not so concluded, nor have we examined the instructions with a view of determining their correctness. Deem-

ing the better practice to be that the errors should be regarded as waived or abandoned.

Affirmed.

I, E. J. HOLMES, Clerk of the Supreme Court of Iowa, do hereby certify that the foregoing pages contain a full, true and complete copy of the opinion of said Court, in the case of Renwick, Shaw & Crossett *vs.* The Davenport & N. W. R. W. Co., as full, true and complete as the same remains on file and of record in my office.

SEAL OF THE SUPREME COURT OF IOWA.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of said Court, this 9th day of Dec., A. D. 1878.

E. J. HOLMES, *Clerk*.

OFFICE SUPREME COURT U. S.
FILED
MAR 4 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

THE DAVENPORT & NORTHWESTERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

RENWICK, SHAW & CROSSETT, *Defendants in Error*.

ERROR TO THE SUPREME COURT OF IOWA.

Argument for the Plaintiffs in Error on the motion to dismiss the Writ of Error.

BY

GRANT & GRANT.

FILED , 18 .

SUPREME COURT OF THE UNITED STATES.

THE DAVENPORT & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
RENWICK, SHAW & CROSSETT,
Defendants in Error.

ERROR TO THE SUPREME COURT OF IOWA.

Argument for the Plaintiffs in Error on the motion to dismiss the Writ of Error.

BY

GRANT & GRANT.

By reference to the map, which accompanies the record, the court will see that the defendant, Renwick, of Renwick, Shaw & Crossett, had erected a pier or crib out in the Mississippi river, extending about a hundred feet beyond low water mark, and connected this crib with the shore, so as to make a boom to hold saw logs for their mill, on the shore above high water mark.

The plaintiff in error was engaged in building a railroad between high and low water mark, under an ordinance of the city authorizing the same. (Record, page 84, § 1, &c.)

Under this ordinance, and laws of the State which we

shall quote, in connection with instruction 4 asked to be given to the jury and refused, and in which error was assigned and overruled in the Supreme Court, the Railroad Company was required to furnish to Renwick, Shaw & Crossett, suitable and proper openings and crossings through and over their embankment, to enable them to have free access to the river, and the only damage which Renwick, Shaw & Crossett could lawfully sustain was the injury which might be caused to their boom for holding saw logs in the river, and the evidence shows that all the proof for damages went to that point.

As the law stood at the passage of the Act of Congress of March 3d, 1873, a riparian owner who had erected a pier in the river and made a boom to hold saw logs, could not recover any damages for being cut off from the river, because he had no private rights which could be invaded by such use of the land between high and low water mark.

In Tomlin *vs.* Dubuque, &c., 32 Iowa, page 106, the head note says: "The owners of lands lying along such a river "(Mississippi) has no private right in the waters thereof or "in the shore, between high and low water mark, and he "cannot recover damages for being deprived of access to "the stream, by reason of the construction of a railroad "along its banks, between such marks."

And this head note is a correct statement of the text of the opinion on pages 109 and 110.

We print here the Act of Congress of March 3d, 1873, and right after it the Act of the State Legislature of March 18th, 1874.

We need not print the general laws of Iowa authorizing persons to create corporations to build railroads, but we print sections 1241, 1262, 1263, 1264, 1266 and 1267 of the

Code of Iowa, which authorize such corporations to take private property, and which regulate their mode of using and crossing highways, and authorizing city councils to regulate and control the use of highways in cities.

CHAPTER CCLXXVIII.

"*An Act for the Protection of Owners of Saw-Mills on the "Mississippi River.*

"*Be it enacted by the Senate and House of Representa-* " *tives of the United States of America in Congress assem-* " *bled*, That the owners of saw-mills on the Mississippi " river be, and they hereby are, authorized and empow- " ered, under the direction of the Secretary of War, to con- " struct or build piers or cribs in front of their mill prop- " erty on the banks of said river, for the protection of their " mills and rafts against damage by floods and ice: *Pro-* " *vided, however*, That the piers or cribs so constructed " shall not interfere with or obstruct the navigation of said " river: *Provided further*, That in case, by reason of the " shifting of the channel of said river, or from any other " cause, the piers or cribs, the construction of which are " authorized by this act, shall be found to obstruct the nav- " igation of said river at any time, the Government ex- " pressly reserves the right to remove or direct the removal " of any such piers or cribs, at the cost and expense of the " owners thereof.

" APPROVED March 3, 1873.

CHAPTER 35.

RELATING TO RIPARIAN OWNERS.

" AN ACT in relation to Riparian Owners on the Missis- " sippi and Missouri Rivers.

" SECTION 1. *Be it enacted by the General Assembly of* " *the State of Iowa*, That all owners and lessees of lands,

" or lots, situate upon the Iowa banks of the Mississippi " and Missouri rivers, upon which property there is now, " or may hereafter be, carried on any business, which is in " any way connected with the navigation of said rivers, or " to which the said navigation is a proper or convenient ad- " junct, are hereby authorized to construct and maintain, " in front of their said property, piers, cribs, booms, and " other proper and convenient erections and devices for the " use of their respective pursuits and the protection and " harbor of rafts, logs, floats, and other water-crafts: *Pro-* " *vided*, That the same present no material or unreasona- " ble obstruction to the navigation of the stream, or to a " similar use of adjoining property.

" SEC. 2. It shall not be lawful for any person or cor- " poration to construct or operate any railroad or other " obstruction between such lots or lands and either of " said rivers, or upon the shore or margin thereof, unless " the injury and damage to such owners occasioned thereby " shall be first ascertained and compensated in the manner " provided by Chap. 4, title 10 of the Code.

" APPROVED March 18th, 1874."

" SECTION 1241. Any railway corporation organized in " this State, may take and hold, under the provisions of " this chapter, so much real estate as may be necessary for " the location, construction, and convenient use of its rail- " way, and may also take, remove, and use for the con- " struction and repair of said railway and its appurtenan- " ces, any earth, gravel, stone, timber or other materials, " on or from the land so taken; the land so taken other- " wise than by the consent of the owners, shall not exceed " one hundred feet in width, except for wood and water sta- " tions, unless where greater width is necessary for excava- " tion, embankment, or depositing waste earth.

" SEC. 1262. Any such corporation may raise or lower " any turnpike, plank road, or other highway, for the pur- " pose of having its railway pass over or under the same; " and in such cases said corporation shall put such high- " way, as soon as may be, in as good repair and condition " as before such alteration.

" SEC. 1263. If the supervisor, trustees, city council, or " other person having jurisdiction over such highway, re- " quire further or different repairs or alterations made " thereon, or if the same, in their opinion, is unsafe, they " shall give notice thereof in writing to any officer of the " corporation, and if the parties are unable to agree res- " pecting the same, either may apply by petition, setting " out the facts, to the Circuit Court, or Judge thereof, and " such Court or Judge shall cause reasonable notice to be " given the adverse party of the application; the petition " shall be filed in the clerk's office, and may be answered " as in other cases. The Court shall determine the matter " in a summary way and make the necessary orders in re- " lation thereto, giving such corporation a reasonable time " to comply therewith, and upon failure to do so, said " Court may enjoin the corporation from using so much of " its road as interferes with any such highways, and the " Court may award costs in favor of the prevailing party.

" SEC. 1264. Every such corporation, when employed in " raising or lowering any highway, or in making any " other alteration by means of which the same may be ob- " structed shall provide and keep in good order temporary " ways to enable travelers to avoid or pass such obstruc- " tions.

" SEC. 1266. Every such corporation shall mantain and " keep in good repair all bridges, with their abutments,

" which it may construct for the purpose of enabling its " railway to pass over or under any turnpike, highway, " canal, water course, or other way.

" SEC. 1267. Every such corporation shall be liable " for all damages sustained by any person in consequence " of any neglect of the provisions of this chapter."

After reading these two acts, we think it is quite apparent they are in conflict with each other. Congress prohibits the erection of piers or cribs in front of their mill property, on the banks of the Mississippi river for protection of their mills and rafts against damage by floods, except under direction of the Secretary of War: Act of the 3d of March, 1873.

The Legislature of Iowa says such owners or lessees are authorized to construct and maintain in front of their said property, piers, cribs, booms, and other proper and convenient erections and devices for the protection and harbor of rafts, logs, floats, or other water crafts.

And by section two of same act provides that railroad corporations shall not construct or operate railroads or other obstructions between such lots or lands and either of said rivers (Mississippi and Missouri), or upon the shore or margin thereof, unless the injury and damage to such owners occasioned thereby shall be first ascertained and compensated in the manner provided by Chap. 4, Title 10 of the Code.

The Supreme Court of Iowa (see clause 2 of their opinion), while admitting that the legislation of Congress is exclusive, holds that the second section of the Act of March 18th, 1874, is not a part of and dependent on the first section.

They say the reference of section 2 " to such lots or

"lands" on either of said rivers, does not mean what it says, such lots or lands as have cribs or piers built in front of them; but all lots or lands situate on the banks of either of said rivers, and the Court totally ignores the intensified construction which has to be put on the subsequent word, unless the injury and damage to *such owners*, meaning the owners mentioned in the first section, shall be first ascertained.

But with due deference and respect to the State Court, they endeavored to fortify their evasion of the Act of Congress, and of the decision of this Court, by a similar evasion of their own decisions.

They say that when they decided in the Tomlin case, *supra*, that the adjacent land owner to the river bank, had no private right of property in the water which could be damaged by building a railroad along its banks; that section 1328 of the revised statutes, granting railroads the right of way over the lands belonging to the State, meaning swamp, railroad, or other lands owned by the State, was repealed by the Act of March 18th, 1874.

That is what the decision means. The words are: "in " its place the statute of 1874 had been substituted."

The counsel on the other side say, that the State Court having construed the State Act of 1874 not to conflict with the Act of Congress, this Court must follow the State Court construction of it.

If that be the law of this Court, that it must follow the State Courts whenever a State Court says that an Act of the State Legislature conflicts with an Act of Congress, are they the final arbiters of the question, and there is no power of review in this Court, under the 25th section of the Judiciary Act. This is not the usual reading of the 25th section of

the Judiciary Act, and there is nothing in the words of the act, or the decisions of this Court.

The 25th section of the Judiciary Act, Revised Statutes, page 132, says:

" A final judgment or decree in any suit, in the highest " Court of a State, in which a decision in the suit could be " had, where is drawn in question the validity of a statute " or authority exercised under any statute of the United " States, and the decision is against their validity; or " where is drawn in question the validity of a statute " or authority exercised under any statute of a State, " on the ground of being repugnant to the constitution and " laws of the United States, and the decision is in favor of " their validity, may be examined by a writ of error in " this Court."

Instructions Nos. 1, 2, 3, 4, 5, 6 and 7, asked for and refused by the Court (record, 75 and 76), raised all these questions. The Court in their opinion say, that the validity of the Act of Congress is drawn in question and they decide against it. They say the invalidity of the Act of the Legislature of March 18th, 1874, is drawn in question and they decide in its favor, and because the State Court has so decided, the counsel against us argue that this Court has no jurisdiction.

Why that is the very foundation stone on which the jurisdiction rests.

We raised the question of the validity of an Act of Congress, which makes the act for which damages are claimed a nuisance.

The State Supreme Court says that is not the Act of Congress. It does not make or prohibit, or render unlaw-

ful the act done by authority of a subsequent Act of the Legislature of Iowa.

We say these acts directly conflict. The question is fairly and fully made. The State Supreme Court says they do not conflict. Our redress is under the 25th section of the Judiciary Act; and if a State Court decision adverse to that Act can deprive us of a writ of error, we are without remedy. The adverse decision, and not the correctness of it, gives this Court the right of review. The error or correctness of the State Court opinion cannot be examined or reviewed by a motion. Did the constitutional question arise? Was it made? Was it decided adversely to the Act of Congress?

This Court has decided that such acts as those, for which the defendants in error seek damages, (read Renwick's evidence,) the erection of a crib in the Mississippi river without the approval of the Secretary of War, is a nuisance, under the Act of Congress. The State Court decides that though that may be true, the State Act can override the Act of Congress, and give damages to "*such* owners" as violate the Act of Congress, and erect cribs and make log booms without the consent of the Secretary of War.

The State Court does not invalidate in direct terms its former decision, that the riparian owner has no rights, below high water, for which damages can be recovered; but they say, that the Act of March 18th, 1874, gives damages to all riparian owners, whether they have erected cribs or not.

We know of no rule or principle in jurisprudence which which prevents a court from deciding directly against the plain and unmistakeable meaning of the law.

Says the law of 1874: The owners of lands on the banks of the Mississippi and Missouri Rivers, on whose property any business is carried on connected with the navigation of the river, are authorized to erect cribs, piers or booms, for the protection and harbor of rafts, logs, &c., and that no railroad shall be built, between *such* lands and the river, without paying to *such* owner damages occasioned thereby.

The Act of Congress says such owners shall not build such cribs, piers, &c., without the consent of the Secretary of War, and this Court declares, that when built without such consent, the structures are nuisances.

The Supreme Court of Iowa held in the Tomlin case, *supra*, that riparian mill owners on navigable rivers of the State had no private rights between high and low water mark, which could be appropriated for public use by compensation; that the river was all *publici juris*.

Until the Act of March 18, 1874, the riparian mill owner had no rights whatever between high and low water marks. The first section of that act gives him a right he did not possess before. The second section of that act gives to such mill owner, for such right as is granted by the first section, a right to compensation when such right is appropriated for public use.

The Act of Congress of March 3d, 1873, is exclusive in its nature. It has legislated on the rights of riparian mill owners, and declares that they cannot acquire any right, except by the approval of the Secretary of War.

The State of Iowa, after this, legislates on the same subject, and gives to riparian mill owners a right independent of the Act of Congress.

The Railroad Company, under a license or ordinance

from the City of Davenport, which by its charter has complete control of the river bank, gives a license to a railroad to run its track between high and low water mark. The State Court says that under the State Act of 1874 Renwick is entitled to compensation for injury to a right which exists alone by that Act. Without the Act of March 18, 1874, Renwick, Shaw & Crossett could not claim damages. They get the right to damages wholly by the first section of the Act, which is required to be appraised by the second section.

The first section conflicts with the Act of Congress of March 3d, 1873, and the damages for the right given by that section is the sole damage which is or could be provided for by the second section.

We contend, that the State Court decision is against the validity of the Act of Congress, and establishes a State Act against the Act of Congress. The Supreme Court of Iowa says it has not invalidated the Act of Congress. That is the very question on which this Court has jurisdiction, and to try which this writ of error is issued. If the State Court's interpretation of its State statute, whether it invalidates an Act of Congress, where Congress has superior jurisdiction and exclusive jurisdiction when exercised, is to bind this Court, then the State Court can in all cases, when a State Act conflicts with an Act of Congress, deprive this Court of its jurisdiction under the constitution.

GRANT & GRANT,
For the Plaintiff in Error.